

FILED IN  
13th COURT OF APPEALS  
CORPUS CHRISTI/EDINBURG, TEXAS  
2/12/2021 3:05:57 PM  
KATHY S. MILLS  
Clerk

February 12, 2021

Ms. Kathy S. Mills  
Clerk, Court of Appeals for the Thirteenth Judicial District  
Nueces County Courthouse  
901 Leopard, 10th Floor  
Corpus Christi, Texas 78401

Courthouse Annex III  
100 E. Cano, 5th Floor  
Edinburg, Texas 78539

Re: Letter of Supplemental Authority in Cause No. 13-19-00500-CV; *Texas Auto Salvage Inc. et al. v. DD Ramirez, Inc., et al.*

Dear Ms. Mills,

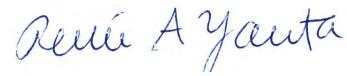
Please find attached a letter of Supplemental Authorities (with cases attached) Texas Auto Salvage (“TASI”) seeks to file in the present case.

This case is set for oral argument at 10:00 a.m. on February 18, 2021, before a panel comprised of Chief Justice Contreras, Justice Hinojosa and Justice Silva.

We would be most grateful if you could forward the attached Letter of Supplemental Authorities (with the cases attached) to our panel: Chief Justice Contreras, Justice Hinojosa and Justice Silva.

Thank you so very much.

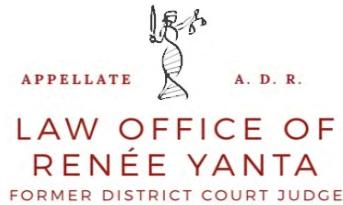
Sincerely,



Renée Yanta  
Attorney for Appellants,  
Texas Auto Salvage, Inc. et al.

CC (by efiling):

Hon. Samuel V. Houston III  
Houston Dunn, PLLC  
4040 Broadway St. Suite 515  
San Antonio, TX 78209-6300



February 12, 2021

Chief Justice Dori Contreras, Justice Leticia Hinojosa and Justice Clarissa Silva  
Court of Appeals for the Thirteenth Judicial District  
Nueces County Courthouse  
901 Leopard, 10th Floor  
Corpus Christi, Texas 78401

Courthouse Annex III  
100 E. Cano, 5th Floor  
Edinburg, Texas 78539

Re: Letter of Supplemental Authority in Cause No. 13-19-00500-CV; *Texas Auto Salvage Inc. et al. v. DD Ramirez, Inc., et al.*

Dear Chief Justice Contreras, Justice Hinojosa and Justice Silva,

Appellee has argued that Texas law does not permit a private citizen to enjoin violations of municipal ordinances that constitute public nuisances. In preparing for oral argument, Texas Auto Salvage (“TASI”) became aware of several supplemental authorities, which may further assist this Honorable Court in analyzing whether TASI may enjoin DD Ramirez from continuing to create conditions violating Chapter 16 of the Code of the City of San Antonio:

*Luensmann v. Zimmer-Zampese & Associates, Inc.*, 103 S.W.3d 594, 598 (Tex. App.—San Antonio 2003, no pet.) (recognizing private citizen may enjoin nuisance arising from violation of ordinance when municipality provides such violation is nuisance): “The second theory, most often applied in cases involving municipalities, permits a plaintiff to prove nuisance per se by proving a violation of law. See *Newton v. Town of Highland Park*, 282 S.W.2d 266, 277 (Tex. App.—Dallas

1955, writ ref'd n.r.e.). However, violation of a statute or ordinance, without additional evidence of nuisance, is insufficient to prove the claim. *See Maranatha*, 893 S.W.2d at 100. This type of nuisance per se case typically arises when the municipality categorizes a particular activity as a nuisance and forbids it within the jurisdiction.”

*Padgett v. City of Madisonville*, No. 10-02-199-CV, 2004 WL 254014, at \*1 (Tex. App.—Waco Feb. 11, 2004) (when private citizen sued a municipality for nuisance, court of appeals recognized nuisance “cause of action” based on violation of section 341.011 of Texas Health & Safety Code because Code designated such violation as nuisance).

*Couch v. Davis*, No. 14-94-01060-CV, 1996 WL 354739, at \*2 (Tex. App.—Houston [14<sup>th</sup> Dist.] June 27, 1996, no writ) (in nuisance case based on violation of zoning ordinance, recognizing “violating the law may create a nuisance per se if the violation invades the rights of others”; however, over defendants’ objections to the jury charge, plaintiffs did not obtain the requisite finding that their rights were personally invaded; as such, plaintiffs did not have standing).

Texas Auto Salvage also found supplemental authorities addressing the proper standard for determining whether a plaintiff has experienced a special injury. Texas Auto Salvage respectfully submits these authorities to further assist this Honorable Court in considering whether there is more than a scintilla of evidence Texas Auto Salvage had standing to assert the common law and statutory nuisance-based claims:

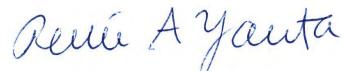
*Heckman v. Williamson County*, 369 S.W.3d 137, 155–56 (Tex. 2012) (discussing three elements of standing): “Under Texas law … the standing inquiry begins with the plaintiff’s alleged injury. The plaintiff must be personally injured—he must plead facts demonstrating that he, himself (rather than a third party or the public at large), suffered the injury.” “The second element of the standing test requires that the plaintiff’s alleged injury be “fairly traceable” to the defendant’s conduct.” “The third element of standing requires that the plaintiff’s alleged injury be ‘likely to be redressed by the requested relief, … he must simply establish a ‘substantial likelihood that the requested relief will remedy the alleged injury in fact.’”).

*Tex. Dep’t of Family & Protective Services v. Grassroots Leadership, Inc.*, No. 03-18-00261-CV, 2018 WL 6187433, at \*6 (Tex. App.—Austin Nov. 28, 2018, pet. dismissed by agreement) (holding (i) “[a] substantial risk of injury is sufficient to confer standing” and (ii) “the

standing test does not require a balancing between alleged harm and benefit; it requires only a showing of harm, even simply ‘an identifiable trifle.’ *See United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973) (noting that ‘injury in fact’ element of standing test ‘serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem’); *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017) (holding that injury requirement of standing inquiry is ‘qualitative, not quantitative’).”

The supplemental authorities are attached.

Sincerely,



Renée Yanta  
Attorney for Appellants,  
Texas Auto Salvage, Inc. et al.

CC (by efilng):

Hon. Samuel V. Houston III  
Houston Dunn, PLLC  
4040 Broadway St. Suite 515  
San Antonio, TX 78209-6300

103 S.W.3d 594  
Court of Appeals of Texas,  
San Antonio.

Anna Del LUENSMANN,  
Roland Luensmann, and  
Edna Reininger, Appellants,

v.

ZIMMER-ZAMPESE & ASSOCIATES,  
INC. d/b/a River City Raceway, Appellee.

No. 04-02-00106-CV.

|

Feb. 12, 2003.

### Synopsis

Homeowners brought action against raceway, alleging nuisance, nuisance per se, and trespass resulting from drag racing that occurred 700 feet from their homes. The 25th Judicial District Court, Guadalupe County, Don B. Morgan, J., entered judgment for raceway. Homeowners appealed. The Court of Appeals, Catherine Stone, J., held that: (1) disorderly conduct statute was not admissible once raceway rebutted presumption that noise was unreasonable; (2) introduction of such statute could mislead jury; (3) homeowners could not prove nuisance per se on theory that drag racing was a nuisance at all times; (4) homeowners could not prove nuisance per se on theory that raceway's activities violated law; and (5) evidence supported finding that smoke and fumes from raceway did not trespass onto homeowners' property.

Affirmed.

West Headnotes (16)

### [1] Nuisance Evidence

Presumption in disorderly conduct statute that noise louder than 85 decibels was unreasonable was not evidence that raceway's drag racing activities made unreasonable noise, and thus, disorderly conduct statute was not admissible in nearby homeowners' nuisance action once raceway rebutted presumption by introducing evidence that noise on the property exceeded 85

decibels even before race track was constructed. V.T.C.A., Penal Code § 42.01(c)(2).

### [2] Appeal and Error Admission or exclusion of evidence in general

The decision to admit or exclude evidence is reviewed for an abuse of discretion.

### [3] Evidence Rebuttal of presumptions of fact

Any weight given to a rebuttable or "bursting bubble" presumption vanishes when evidence to rebut the presumption is introduced.

### [4] Evidence Tendency to mislead or confuse

Introduction of criminal disorderly conduct statute, containing presumption that noise louder than 85 decibels was unreasonable, could mislead jury into believing that if raceway violated the statute, it must be found civilly liable in nuisance action brought by nearby homeowners, and thus, statute was not admissible. Rules of Evid., Rule 403; V.T.C.A., Penal Code § 42.01(c)(2).

### [5] Appeal and Error Sufficiency of evidence

In reviewing a directed verdict, the appellate court decides whether there is any evidence of probative value to raise issues of fact on the material questions presented.

### [6] Appeal and Error Preverdict motions; direction of verdict

On review of a directed verdict, the appellate court views the evidence in the light most favorable to the party suffering the adverse judgment.

### [7] Trial Sufficiency to present issue of fact

**Trial**  Insufficiency to support other verdict; conclusive evidence

**Trial** Nature and Grounds

A directed verdict is proper if: (1) the opponent's pleadings are insufficient to support a judgment; (2) the evidence conclusively proves a fact that establishes a party's right to judgment as a matter of law; or (3) the evidence offered on a cause of action is insufficient to raise an issue of fact.

[8] **Nuisance** Games and entertainments

Homeowners could not prove nuisance per se on theory that drag racing at nearby raceway was a nuisance at all times, under any circumstances, and in any location, where such racing was conducted only at night, and only on certain nights, and there was no allegation that drag racing was a nuisance when race track was closed.

1 Cases that cite this headnote

[9] **Nuisance** Acts authorized or prohibited by public authority

Absent any allegation that raceway was prosecuted for violating the disorderly conduct statute or was even given a warning by a magistrate or peace officer, homeowners living near raceway could not prove nuisance per se on theory that raceway's activities violated the law. V.T.C.A., Penal Code § 42.01(a)(5), (c)(2).

[10] **Nuisance** Acts authorized or prohibited by public authority

Violation of a statute or ordinance, without additional evidence of nuisance, is insufficient to prove claim of nuisance per se.

1 Cases that cite this headnote

[11] **Nuisance** Acts authorized or prohibited by public authority

Drag racing conducted by raceway was not a nuisance per se under common law, where Legislature did not declare drag racing a nuisance, and no statute prohibited operation of a drag racing facility.

[12] **Appeal and Error** Instructions

Homeowners' written objections to jury charge in nuisance action, consisting of proposed charge and questions, instructions, and definitions with check marks to indicate whether their requests were granted or denied, did not inform the court of complaint with charge so the court could cure it, and thus waived charge error on appeal.

[13] **Trespass** Weight and Sufficiency

Evidence was sufficient to support finding that smoke and fumes from drag racing did not trespass onto homeowners' property located 700 feet from raceway; raceway official testified that he installed sound-proofing devices at the starting line as well as 14-foot fences to prevent noise, smoke, or fumes from entering the homeowners' property, other residents in neighborhood testified they had not noticed any smoke, and all neighbors except plaintiff homeowner testified that the wind generally blew smoke from the track away from their homes.

[14] **Trespass** Trespass to Real Property

A trespass occurs when there is some entry upon another's land without consent.

[15] **Nuisance** Care and precautions against annoyance or injury

**Nuisance** Similar annoyances or injuries from other causes

Homeowners residing near raceway were not entitled to permanent injunctive relief limiting drag racing, even though disorderly conduct statute prohibited noise exceeding 85 decibels, where noise from other sources, including nearby highway, railroad tracks, shooting range, and air traffic, exceeded 85 decibels even before raceway began operations, and homeowners refused raceway's offer to improve homeowners' fences and soundproof their windows to prevent

smoke and noise from entering their homes.  
V.T.C.A., Penal Code § 42.01.

**[16] Appeal and Error** ↗ Granting or refusing

Appellate court reviews the trial court's ruling on applications for injunctions for an abuse of discretion.

Force Base. Adding to the noise, a moto-cross track recently opened in the neighborhood.

The Luensmanns sued on theories of nuisance, nuisance per se, and trespass, and obtained a temporary restraining order limiting Zimmer-Zampese's nocturnal operations. At trial, the court granted Zimmer-Zampese's motion for directed verdict on nuisance per se. The jury found that the racing strip was not a nuisance and Zimmer-Zampese did not trespass on the Luensmanns' land. The court entered judgment for Zimmer-Zampese and dissolved the temporary restraining order. On appeal, the Luensmanns claim that the trial court erred in excluding evidence of Penal Code violations, in instructing the jury on negligent nuisance, and in \*597 failing to grant their motion for judgment *non obstante verdicto*. We affirm the judgment of the trial court.

### Attorneys and Law Firms

\***596** J. Ken Nunley, William A. Brant and Kelly Putney Rogers, Nunley, Davis, Jolley & Hill, L.L.P., Boerne, for Appellants.

Laura A. Cavaretta and Cathy J. Sheehan, Plunkett & Gibson, Inc, San Antonio, S. Mark Murray, S. Mark Murray, Inc, San Antonio, for Appellee.

Sitting: ALMA L. LÓPEZ, Chief Justice, CATHERINE STONE, Justice, PAUL W. GREEN, Justice.

### Opinion

Opinion by: CATHERINE STONE, Justice.

This appeal illustrates the tension that often arises when "modern development" occurs in what was once a quiet neighborhood. Anna Luensmann and her husband live in Guadalupe County in a home where Anna has lived since 1947. Edna Reininger lives nearby in a home she has occupied for the last twenty-six years. In May of 1999, Appellee Zimmer-Zampese & Associates, Inc. began constructing a drag racing strip approximately 700 feet from the Luensmann and Reininger homes. Appellants Anna and Roland Luensmann and Edna Reininger ("the Luensmanns") unsuccessfully sought to enjoin construction. River City Raceway now runs up to 200 races on Wednesday, Friday, Saturday, and Sunday nights. The Luensmanns claim that the races are loud and cause vibrations that shake their homes. They claim that lights from the track can be seen miles away and that smoke produced by the cars impedes visibility on the adjoining streets and blows onto their property. However, River City Raceway is not the only source of noise which affects the Luensmanns. Their homes are near a shooting range, railroad tracks, and Interstate 10. Their homes are also near the Zuehl Airport and in the flight path of Randolph Air

### Excluded Evidence Relating to the Disorderly Conduct Statute

The Luensmanns argue that they pled and proved that the track violated the disorderly conduct statute. Under Tex. Pen.Code Ann. § 42.01(c)(2), "a noise is presumed to be unreasonable if the noise exceeds a decibel level of 85 after the person making the noise receives notice from a magistrate or peace officer that the noise is a public nuisance." The Luensmanns claim the trial court erroneously denied introduction of the statute itself and of testimony about its presumption of unreasonableness. However, they made no offer of proof at trial. To preserve a complaint about excluded evidence in the absence of an offer of proof, a substantial right of the party must be affected and the substance of the excluded evidence must be apparent from the context. Tex.R. Evid. 103(a)(2).

**[1]** **[2]** **[3]** The Luensmanns' substantial rights were not affected because exclusion of this evidence was not harmful error. The decision to admit or exclude evidence is reviewed for an abuse of discretion. *See Tex. Dep't of Transp. v. Able*, 35 S.W.3d 608, 617 (Tex.2000). The disorderly conduct statute supplies the presumption that noise louder than 85 decibels is unreasonable. A presumption, however, is not "evidence," and in this case, the trial court correctly ruled against its admission. *See Cliff v. Huggins*, 724 S.W.2d 778, 780 (Tex.1987). Any weight given to a rebuttable or "bursting bubble" presumption vanishes when evidence to rebut the presumption is introduced. *Id.* Zimmer-Zampese rebutted the presumption of unreasonableness with evidence that even

before the track was constructed, noise at the Luensmanns' property exceeded 85 decibels. After this evidence was introduced, any statutory presumption that Zimmer-Zampese made unreasonable noise vanished. *See Id.* The trial court therefore correctly excluded evidence relating to the statute.

[4] Additionally, admitting this statute into evidence would have been improper because it may have led the jury to believe that if Zimmer-Zampese violated the criminal statute, it must be found liable. *See Tex.R. Evid. 403.* The Supreme Court has repeatedly stated that criminal statutes do not always represent the standard for civil liability. *See Reeder v. Daniel*, 61 S.W.3d 359, 362 (Tex.2001); *Carter v. William Sommerville & Son, Inc.*, 584 S.W.2d 274, 279 (Tex.1979). The standard for proving a violation of the disorderly conduct statute is different than the standard for proving a nuisance, a nuisance per se, or a trespass. Based on relevancy considerations as well as the rebutted statutory presumption of unreasonableness, the trial court correctly excluded this evidence. Because the evidence was properly excluded, the Luensmanns' argument that their substantial rights were affected is without merit. Since no substantial right has been affected, their first issue is overruled.

### **Complaints Regarding Judgment as a Matter of Law**

The Luensmanns argue that they were entitled to judgment *non obstante verdicto* on the issue of nuisance per se. Zimmer-Zampese responds that the Luensmanns request relief to which they are not entitled because there was no jury verdict on nuisance per se for the court to set aside. Zimmer-Zampese also claims that the Luensmanns' failure to complain about the directed verdict entered in favor of Zimmer-Zampese waives any complaint relating to the nuisance per se claim. However, the Luensmanns' basic argument is \*598 that the trial court granted judgment as a matter of law to the wrong party. Under Tex.R.App. P. 38.1(e), "(t)he statement of an issue or point will be treated as fairly covering every subsidiary question that is fairly included." By complaining of the trial court's failure to grant JNOV, the Luensmanns' brief fairly covers the question of whether the court granted judgment as a matter of law to the correct party, and therefore preserves it for review. *See Stephenson v. LeBoeuf*, 16 S.W.3d 829, 843 (Tex.App.-Houston [14th Dist.] 2000, pet denied).

[5] [6] [7] In reviewing a directed verdict, we decide whether there is any evidence of probative value to raise issues of fact on the material questions presented. W. Wendell

Hall, *Standards of Review in Texas*, 34 St. Mary's L.J. 1, 119 (2002), citing *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex.2001) (per curiam). We view the evidence in the light most favorable to the party suffering the adverse judgment. *S.V. v. R.V.*, 933 S.W.2d 1, 8 (Tex.1996). A directed verdict is proper if: (1) the opponent's pleadings are insufficient to support a judgment; (2) the evidence conclusively proves a fact that establishes a party's right to judgment as a matter of law; or (3) the evidence offered on a cause of action is insufficient to raise an issue of fact. *Rudolph v. ABC Pest Control, Inc.*, 763 S.W.2d 930, 932 (Tex.App.-San Antonio 1989, writ denied).

[8] The parties disagree about the elements required to prove nuisance per se. The Luensmanns believe that nuisance and nuisance per se share the same relationship as negligence and negligence per se. However, a person does not commit nuisance per se simply by violating a statute and causing a nuisance. Instead, the Luensmanns can prove nuisance per se on one of two theories. Because there are no findings of fact and conclusions of law, and because the Luensmanns' pleadings and proof did not advance one theory over another, we will discuss both theories. First, the Luensmanns can prove nuisance per se by proving that the activity was a nuisance at all times, under any circumstances, and in any location. *See Maranatha Temple, Inc. v. Enter. Prods. Co.*, 893 S.W.2d 92, 100 (Tex.App.-Houston [1st Dist.] 1994, writ denied). However, their own pleadings establish that racing is conducted only at night, and then only on certain nights. They have not alleged that the track is a nuisance when it is closed. Therefore, if the trial court based its directed verdict on the "at all times" theory, then the Luensmanns' own pleadings conclusively established Zimmer-Zampese's right to a directed verdict.

[9] [10] The second theory, most often applied in cases involving municipalities, permits a plaintiff to prove nuisance per se by proving a violation of law. *See Newton v. Town of Highland Park*, 282 S.W.2d 266, 277 (Tex.App.-Dallas 1955, writ ref'd n.r.e.). However, violation of a statute or ordinance, without additional evidence of nuisance, is insufficient to prove the claim. *See Maranatha*, 893 S.W.2d at 100. This type of nuisance per se case typically arises when the municipality categorizes a particular activity as a nuisance and forbids it within the jurisdiction. In such a case, the municipality's action is not valid unless the activity was a nuisance per se at common law. *Id.* This court addressed the "violation of law" theory of nuisance per se as it related to a horse racing track and held that the track was not a nuisance per se. *See Otten*

v. *Town of China Grove*, 660 S.W.2d 565, 567 (Tex.App.-San Antonio 1983, writ dism'd).

[11] In *Otten*, this court found that horse racing was not a nuisance per se at common law, even though the illegal gambling \*599 allegedly occurring at the track was, because horse racing had not been declared a nuisance by the Legislature and because it was not illegal to race horses. *Id.* Similarly, under the common law, Zimmer-Zampese's drag racing is not a nuisance per se. Drag racing has not been declared a nuisance by the Legislature, and no statute prohibits operation of a drag racing facility. The Luensmanns rely on the disorderly conduct statute to prove a violation of law, but they failed to allege that Zimmer-Zampese has been prosecuted for violating the disorderly conduct statute. Additionally, the statute requires that before a person can violate the disorderly conduct statute, they must be given a warning by a magistrate or peace officer. See Tex. Pen.Code Ann. 42.01(a)(5)(Vernon 2002). The record contains no evidence that such a warning has ever been given. Thus, even based on the "violation of law" theory of nuisance per se, the court correctly granted judgment as a matter of law. We therefore overrule the Luensmanns' second issue.

### Complaints About the Court's Charge

[12] Next, the Luensmanns raise two complaints of charge error. However, during the charge conference, the Luensmanns' only statement was, "(o)ther than the objections as set out in writing, Your Honor, we have no further objections." As written objections, the Luensmanns' attorney submitted a proposed charge and marked its questions, instructions, and definitions with check marks to indicate whether the requests were granted or denied. This is insufficient to preserve error under either Tex.R.App. P. 33.1 or Tex.R. Civ. P. 274. The Luensmanns' attorney did not inform the court of the complaint so the court could cure it. See *State Dep't of Highways and Pub. Transp. v. Payne*, 838 S.W.2d 235, 240 (Tex.1992). Therefore, the Luensmanns' complaints regarding any possible charge error are waived and their third issue is overruled.

### Sufficiency of the Evidence on Trespass

[13] The Luensmanns complain that the jury's finding on trespass is not supported by legally or factually sufficient evidence. In reviewing a legal sufficiency challenge, the court

examines the record for evidence that supports the finding and ignores all evidence to the contrary. *Francis*, 46 S.W.3d at 241. If no evidence supports the finding, this court then examines the entire record to decide whether the contrary proposition is established as a matter of law. *Id.* If the contrary proposition is established as a matter of law, then the legal sufficiency challenge will be sustained. *Id.*

[14] Because more than a scintilla of evidence supports the jury's findings, the legal insufficiency challenge is overruled. A trespass occurs when there is some entry upon another's land without consent. *R.R. Comm'n of Tex. v. Manziel*, 361 S.W.2d 560, 567 (Tex.1962). Todd Zampese testified that he has never seen smoke from the track on the Luensmanns' property. He also testified that he installed sound-proofing devices at the starting line as well as fourteen-foot fences to prevent noise, smoke, or fumes from entering the Luensmanns' property. Other residents of the Luensmanns' neighborhood testified they have not noticed any smoke. All neighbors except Roland Luensmann testified that the wind generally blows smoke from the track away from their homes. This testimony is more than a scintilla of evidence supporting the jury's finding that Zimmer-Zampese did not trespass onto the Luensmanns' property. See *Francis*, 46 S.W.3d at 241.

The Luensmanns also raise a factual sufficiency complaint. In a factual sufficiency \*600 challenge, this court examines the entire record to determine if there is some evidence to support the finding. *Id.* If there is some evidence, this court decides whether the finding is so against the overwhelming weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *Id.*

The evidence set forth in the legal sufficiency analysis likewise applies to the Luensmanns' factual sufficiency claim. That evidence is weighed against contrary evidence to determine whether factually sufficient evidence supports the jury's finding that Zimmer-Zampese did not trespass. *Id.* In their brief, the Luensmanns argue that the wind sometimes blows in the direction of the Luensmanns' property, bringing smoke and fumes from the track with it. Support for this argument came from Roland Luensmann, who testified that the wind only blows from the north on the weekends. The Luensmanns presented another witness who testified that she saw smoke on the Luensmanns' property several times. Finally, the Luensmanns introduced a letter from the Texas Natural Resources Conservation Commission to Zimmer-Zampese notifying it that the smoke and fumes constituted a borderline nuisance. This letter was introduced for notice

purposes only, not for the truth of the allegations that smoke or fumes entered the Luensmanns property. *See Tex.R. Evid. 802.*

[15] Although there is conflicting evidence on this issue, there is sufficient evidence to support the jury's finding that Zimmer-Zampese did not trespass. That finding was not so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. *See Herbert v. Herbert*, 754 S.W.2d 141, 144 (Tex.1988). We therefore overrule the Luensmanns' fourth issue.

### Complaints Regarding Denied Injunction

[16] In their final issue, the Luensmanns claim that the trial court abused its discretion in denying their request for injunctive relief. We review the trial court's ruling on applications for injunctions for an abuse of discretion. *See Operation Rescue—Nat'l v. Planned Parenthood of Houston & Southeast Tex., Inc.*, 975 S.W.2d 546, 560 (Tex.1998).

The Luensmanns argue that when a violation of substantive law occurs, the trial court has no discretion and must enjoin the violation. *See Crain v. The Unauthorized Practice of Law Committee of the Supreme Court of Texas*, 11 S.W.3d 328, 332 (Tex.App.-Houston [1st Dist.] 1999, pet. denied). However, the jury found that Zimmer-Zampese did not violate the law, and those findings are supported by legally and factually sufficient evidence. The trial court therefore correctly denied the Luensmanns' request for a permanent injunction.

At oral argument, counsel for the Luensmanns expressed frustration that the trial court granted temporary injunctive relief based in part on evidence that the race track noise exceeds 85 decibels, but then excluded evidence of the disorderly conduct statute and denied permanent injunctive relief. While counsel's frustration is understandable, we are

mindful that the evidence at trial clearly permitted the judge to conclude that the noise from other sources—the highway, the train tracks, the shooting range, and the air traffic—exceeded 85 decibels even before the race track began operations. Under the circumstances, the trial court acted within its discretion in determining that permanent injunctive relief was not warranted. *See Walling v. Metcalfe*, 863 S.W.2d 56, 58 (Tex.1993).

\***601** The Luensmanns' ability to obtain injunctive relief is further hampered by the fact that the Luensmanns could not establish that they would suffer irreparable injury if the injunction did not issue. *See Stein v. Killough*, 53 S.W.3d 36, 44 (Tex.App.-San Antonio 2001, no pet.) (holding that proof of irreparable injury is required to entitle claimant to permanent injunctive relief). Uncontroverted testimony established that Zampese offered to improve the Luensmanns' fences and to soundproof their windows to prevent smoke and noise from entering their homes. The Luensmanns, however, rejected those offers. By not allowing Zimmer-Zampese to soundproof their windows or improve their fences, the Luensmanns exacerbated their damages. Furthermore, granting an injunction would not solve the noise problem at the Luensmanns' home. Zimmer-Zampese chose the location because I-10, the shooting range, the railroad tracks, and the two airports make it loud. After balancing the equities, we cannot see how the Luensmanns' quality of life would be substantially improved by closing the track, especially in light of the fact that a moto-cross track has opened in the neighborhood since this litigation began. The trial court correctly denied the Luensmanns' request for injunctive relief. The Luensmanns' final issue is therefore overruled.

The judgment of the trial court is affirmed in all respects.

### All Citations

103 S.W.3d 594

2004 WL 254014

Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR  
DESIGNATION AND SIGNING OF OPINIONS.

**MEMORANDUM OPINION**

Court of Appeals of Texas,  
Waco.

Lola PADGETT and  
Michael Dunn, Appellants  
v.  
CITY OF MADISONVILLE,  
Texas, Appellee.

No. 10-02-199-CV.

|  
Feb. 11, 2004.

**Synopsis**

**Background:** Renter and homeowner brought action against city arising out of sewage back flow into residence from city-owned sewage line. The 278th District Court, Madison County, Jerry A. Sandel, J., granted city's plea to the jurisdiction. Renter and homeowner appealed.

**Holdings:** The Court of Appeals, Tom Gray, C.J., held that:

[1] trial court had jurisdiction to consider inverse condemnation and nuisance claims, and

[2] city could not be held liable for a nuisance per se.

Reversed in part, affirmed in part, and remanded.

Bill Vance, J., filed concurring opinion.

West Headnotes (2)

[1] **Eminent Domain** Jurisdiction

**Municipal Corporations** Discharge of Sewage

Trial court had jurisdiction to consider renter's and homeowner's inverse condemnation and nuisance claims against city arising out of sewage back flow into residence from city-owned sewer line, despite city's assertion of governmental immunity.

[2]

**Municipal Corporations** Discharge of Sewage

City could not be held liable for a nuisance per se for violation of statute establishing public health nuisances, arising out of sewage back flow from city-owned sewer line into residence; acts of government could not be nuisances per se, and nuisance statute did not contain a clear and unambiguous waiver of government immunity. V.T.C.A., Health & Safety Code § 341.011(5).

From the 278th District Court, Madison County, Texas, Trial Court # 01-95910278-10.

**Attorneys and Law Firms**

Robert L. McHaney, Jr., Law Office of Robert L. McHaney, Jr., Waco, for appellants.

Andrea N. Moore, Oppenheim & Associates, Houston, John R. Bankhead, City of Madisonville, for appellee.

Before Chief Justice GRAY, Justice VANCE, and Justice REYNA.<sup>1</sup>

**MEMORANDUM OPINION**

TOM GRAY, Chief Justice.

\*<sup>1</sup> Lola Padgett rented a home that became damaged when sewage from the city-owned sewer line back-flowed into the residence. Padgett and the property's owner, Michael Dunn, sued the City of Madisonville for nuisance, nuisance-per-se, and inverse condemnation. The City filed a *de facto* plea to the jurisdiction based on governmental immunity, which the trial court granted.

Padgett and Dunn contend in two issues that the trial court erred in granting the City's plea to the jurisdiction, or, in the alternative, prematurely granted the plea. We reverse in part, affirm in part, and remand to the trial court for further proceedings.

### Inverse Condemnation and Nuisance Claims

[1] What actually caused the backup in the sewage line, whether the City knew of the problems, whether it intentionally or negligently failed to correct the cause of the backup, and whether the condition rose to the level of a nuisance or an unconstitutional taking are not known. Based on the current state of the law in this district, we hold that the trial court erred in granting the City's plea to the jurisdiction regarding the inverse condemnation and nuisance claims. *See Cozby v. City of Waco*, 110 S.W.3d 32 (Tex.App.-Waco 2002, no pet.); *Bible Baptist Church v. City of Cleburne*, 848 S.W.2d 826 (Tex.App.-Waco 1993, writ denied). We recognize that an inverse condemnation case on these issues, which could modify our analysis, is currently pending review by the Texas Supreme Court. *See Sabine River Authority of Texas v. Hughes*, 92 S.W.3d 640 (Tex.App.-Beaumont 2002, pet. granted). But on the precedent currently binding on this court, Padgett and Dunn's first issue is sustained, in part.

### Nuisance-per-se

Padgett and Dunn also allege a nuisance-per-se cause of action against the City based on section 341.011 of the Health and Safety Code. That section provides that “[e]ach of the following is a public health nuisance: (5) sewage, human excreta, wastewater, garbage, or other organic wastes deposited, stored, discharged, or exposed in such a way as to be a potential instrument or medium in disease transmission to a person or between persons....” Tex. Health & Safety Code Ann. § 341.011(5) (Vernon 2001).

[2] While we agree that the sewage was discharged in such a way as to violate the statute, we disagree that the City can be held liable for a nuisance per se based upon a violation of the statute alone. “The acts of the government are not nuisances per se.” *City of Addison v. Dallas Indep. Sch. Dist.*, 632 S.W.2d 771, 773 (Tex.App.-Dallas 1982, writ ref'd n.r.e.). Further, the parties point out no language in the statute, nor did we find any, that indicates a “clear and unambiguous” waiver of immunity in the statute. *See Gen.*

*Servs. Commn. v. Little-Tex Insulation Co., Inc.*, 39 S.W.3d 591, 594 (Tex.2001). Padgett and Dunn alleged facts in their petition that affirmatively negate the existence of jurisdiction with regard to their nuisance-per-se claim against the City. *See County of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex.2002); *Cozby*, 110 S.W.3d at 36. Thus, the trial court did not err in granting the City's plea to the jurisdiction on that claim. Issue one is overruled, in part.

\*2 Because of our disposition of issue one, we need not consider issue two.

### Conclusion

The trial court erred in granting the plea to the jurisdiction regarding Padgett's and Dunn's inverse condemnation and nuisance claims; therefore, we reverse that part of the trial court's judgment and remand for further proceedings. The trial court did not err in granting the plea to the jurisdiction regarding the nuisance-per-se claim; therefore, we affirm that part of the trial court's judgment.

Justice VANCE concurring.

BILL VANCE, Justice.

### CONCURRING OPINION

I agree with the result but would sever the claims being remanded for further consideration from those being affirmed. *See Aero Energy, Inc. v. Circle C Drilling Co.*, 699 S.W.2d 821, 823 (Tex.1985); *Hofer v. Lavender*, 679 S.W.2d 470, 471 (Tex.1984). The desirability of a severance appears to stem from the requirement that there be one final judgment in a case. Tex.R. Civ. P. 301; *see Hamilton v. Prescott*, 73 Tex. 565, 11 S.W. 548, 549 (1889). Authority to sever may be found in Rules of Appellate Procedure 43.6 and 44.1(b). Tex.R.App. P. 43.6, 44.1(b); *see also Washington v. Reliable Life Ins. Co.*, 581 S.W.2d 153, 161 (Tex.1979) (citing former rule of civil procedure 503 which used language similar to current Rule 44.1(b)).

We have been inconsistent in our opinions about severance when an error affects only part of a judgment. *Compare Ash v. Hack Branch Dist. Co.*, 54 S.W.3d 401, 419 (Tex.App.-Waco 2001, pet. denied) (severance), with *Cozby v. City of Waco*, 110 S.W.3d 32, 41 (Tex.App.-Waco 2002, no pet.) (no

severance). But that is no reason not to sever claims that are being remanded from those on which the judgment is affirmed so as to make the latter unquestionably final.

**All Citations**

Not Reported in S.W.3d, 2004 WL 254014

**Footnotes**

- 1** This case was submitted with former Chief Justice Davis on the panel, but he resigned effective August 4, 2003. See Tex.R.App. P. 41.1(c). Justice Reyna, who took the oath of office on January 5, 2004, participated in the decision of the court.

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1996 WL 354739

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OPINIONS HAVE NO PRECEDENTIAL  
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NOTATION "(not designated for publication)."

Court of Appeals of Texas, Houston (14th Dist.).

David COUCH and  
Debra Couch, Appellants

v.

Albert W. DAVIS, Rita Davis, Edwin  
N. Mills, and Betty Mills, Appellees

No. 14-94-01060-CV.

|

June 27, 1996.

On Appeal from the 269th District Court Harris County, Texas  
Trial Court Cause No. 89-47836.

## OPINION

ANDERSON.

\*1 Appellants, David and Debra Couch, appeal from a judgment ordering a permanent injunction and awarding damages to appellees. Appellees, Albert Davis, Rita Davis, Edwin Mills and Betty Mills, sued appellants for nuisance-in-fact and nuisance per se. The jury awarded damages to Edwin and Betty Mills, but not to Albert and Rita Davis. Following the jury verdict, the court ordered a permanent injunction. In three points of error, appellants contend the trial court erred by (1) failing to enter findings of fact and conclusions of law; (2) ordering the injunction; and (3) submitting an incorrect jury charge. We affirm in part, and reverse and remand in part.

In 1989, the City of LaPorte zoning board granted appellants a building permit to construct a 2,000 square foot storage building on their land. Appellees, neighbors of the appellants, appealed the decision of the zoning board to the district court, which held the zoning board abused its discretion and declared the building permit to be illegal and invalid. Appellees subsequently added the nuisance action, which was

severed from the action against the zoning board. This appeal is exclusively from the nuisance action.

In their third point of error, appellants contend the trial court erred by submitting the court's jury charge over objection and refusing appellant's proposed questions and instructions. We will address this point as well as appellant's second point of error because they are dispositive of the appeal. The charge submitted by the court predicated liability of the appellants on purported zoning ordinance violations. However, the charge did not require the jury to consider whether any of the purported zoning violations constituted a nuisance to the appellees. According to the charge, if the jury found the appellants violated any portion of the LaPorte zoning ordinance, then they were liable for nuisance.

The trial court has broad discretion to determine what instructions to submit to the jury. *M.N. Dannenbaum, Inc. v. Brummerhop*, 840 S.W.2d 624, 631 (Tex.App.-Houston [14th Dist.] 1992, writ denied). Reversal is not warranted unless an error in the instruction caused or was reasonably calculated to cause the rendition of an improper judgment. *Id.* However, an instruction that misstates the law as applied to the facts of the case is improper. *Id.* Moreover, a clear failure by the trial court to analyze or apply the law is an abuse of discretion. *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex.1992).

In the first instruction, the court instructed the jury that if they found any of certain conditions, which violated LaPorte's residential zoning ordinance, existed on appellants property, then they "must find that a nuisance exists."<sup>1</sup>

This instruction further stated, "A failure to comply with the law is a nuisance in itself." Appellants objected to this instruction, and also asked the trial court to submit an instruction on private nuisance, which the court refused.

\*2 The trial court provided another instruction advising the jury that the storage building was a "nuisance in law" because it was built pursuant to an invalid permit, and therefore, violated the zoning ordinance. Also in this instruction, the court stated, "A failure to comply with the law is a nuisance in itself."

Appellants objected to these instructions on the basis that a jury finding of a zoning violation does not necessarily mean that appellees personally suffered any harm entitling them to injunctive relief. We agree. Nuisance is a condition which substantially interferes with the use and enjoyment of land

by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it. *Bible Baptist Church v. City of Cleburne*, 848 S.W.2d 826, 829 (Tex.App.-Waco 1993, writ denied). A nuisance-in-fact is an act, occupation, or structure that becomes a nuisance because of its surroundings. *Freedman v. Briarcroft Property Owners*, 776 S.W.2d 212, 216 (Tex.App.-Houston [14th Dist.] 1989, writ denied). A nuisance per se is a nuisance at all times, regardless of its location. *Id.*

Further, violating the law may create a nuisance per se if the violation invades the rights of others. *Alpha Enterprises, Inc. v. City of Houston*, 411 S.W.2d 417, 419 (Tex.Civ.App.-Houston [1st dist.], 1967, writ ref'd n.r.e.), cert. denied, 388 U.S. 565 (1967); *Parker v. City of Fort Worth*, 281 S.W.2d 721, 723-24 (Tex.Civ.App.-Fort Worth 1955, no writ). On the other hand, the pursuit of a lawful business in a lawful way cannot be a nuisance per se. *Inwood Forest Comm. Imp. Assoc. v. R.J.S. Development Co.*, 630 S.W.2d 751, 754 (Tex.App.-Houston [1st Dist.] 1982, no writ). Thus, the essential inquiry in determining the existence of a nuisance is the nature and extent to which the condition interferes with or invades the rights of others, which goes beyond the issue of a violation of a statute, regulation or ordinance.

In the instant case, the jury charge not only allowed the jury to find liability for nuisance without the showing of any particular harm to appellees, but instructed the jury that they *must* do so upon finding a violation of the zoning ordinance. Moreover, the injunction, which is appellants' primary concern on appeal, was imposed based upon the jury findings. However, appellees lack standing to enforce LaPorte's zoning ordinances. The proper party to enforce those ordinances is the "appropriate municipal authority" of LaPorte. See Tex. Local Gov't Code Ann. § 211.012(c) (Vernon Supp.1996). For appellees to be entitled to injunctive relief, they must show that their rights were personally invaded. *Abbott v. City of Princeton*, 721 S.W.2d 872, 875 (Tex.App.-Dallas 1986, writ ref'd n.r.e). Although appellees presented some evidence concerning the interference with their rights, the trial court did not require the jury to make a specific finding as to whether the interference constituted a nuisance. Because the submission of these improper instructions was calculated to cause, and probably did cause, the rendition of an improper judgment, the error in the jury charge constituted reversible error. See Tex.R.App. P. 81(b)(1).

\*3 On appeal, appellees urge that even if the trial court erred regarding the instructions described above, reversal is not warranted because the instructions apply only to the jury questions on damages, not the injunction, and appellants are not contending the award of money damages was error. However, the judgment ordering the injunction was based on the jury finding of nuisance. As noted below, the appellees would not be entitled to injunctive relief unless appellees suffered an irreparable injury as a result of a condition created by appellants.

In their second point of error appellants contend the trial court would not have been entitled to enter an injunction even if the jury had properly found a nuisance because appellees never demonstrated irreparable harm. Merely finding that appellants violated the zoning ordinances does not entitle appellees to injunctive relief without a finding that they suffered harm as a result of the violation. See *Hues v. Warren Petroleum Co.*, 814 S.W.2d 526, 529 (Tex.App.-Houston [14th Dist.] 1991, writ denied). A party seeking injunctive relief must demonstrate the following: (1) existence of a wrongful act; (2) existence of imminent harm; (3) existence of irreparable injury; and (4) absence of an adequate remedy at law. *Id.* (emphasis added). Because the jury findings were based on an improper charge, and the judge granted relief based on this charge, neither the jury nor the judge made the essential finding of an irreparable injury before entering the injunction. Moreover, appellants preserved error on this issue by requesting the trial court to submit a question on irreparable injury. Appellees contend, however, that a request for the submission of a question on irreparable injury does not properly preserve error because they were the party with the burden to prove injury, and the proper method to preserve this issue was by an objection. We disagree, because by timely bringing their complaint to the trial court's attention, and obtaining a ruling thereon, appellants preserved error regardless of the burden of proof on the question. See *State Dept. of Highways v. Payne*, 838 S.W.2d 235, 241 (Tex.1992). Additionally, because none of the elements of an injunction were submitted to the jury, this court may not deem this element found as appellees request. See Tex.R. Civ. P. 279.

The requested jury findings that preceded the trial court's instructions asked only whether appellants were violating specific elements of the zoning ordinance. The trial court did not offer any reason for imposing the injunction other than the jury findings. Moreover, because the trial court erroneously refused appellant's request to submit a question on irreparable injury, there is no basis for injunctive relief and reversal

is required. *See Sears, Roebuck & Co. v. Meadows*, 877 S.W.2d 281 (Tex.1994) (trial court's refusal to submit, over objection, essential element of fraud in definitions submitted with the charge was reversible error.) Accordingly, we sustain appellants' second and third points of error. Because we sustain appellants' second and third points of error, we need not address appellants' remaining point. Tex.R.App. P. 90(a).

\***4** Appellants do not seek a new trial. In their prayer for relief, they ask this court to reverse, or modify, the judgment solely on the basis that injunctive relief was improperly granted. Therefore, we affirm the judgment of the trial court

awarding damages, but based on our decision, reverse that portion ordering injunctive relief and remand the case to the trial court for a new trial on the issue of appellees' right to an injunction. *See* T.R.A.P. 81(b).

The judgment of the trial court is affirmed in part, and reversed and remanded in part.

#### All Citations

Not Reported in S.W.2d, 1996 WL 354739

#### Footnotes

- 1** The jury was instructed to answer "yes" or "no" if they found the following acts or conditions by a preponderance of the evidence: (1) Operating any commercial business from residential property; (2) Leaving, standing, or parking a commercial motor vehicle, pole trailer, semi-trailer, shipping container, or a truck tractor on defendants' property; (3) Having a cumulative total greater than two of the following animals per fenced acre at any one time: horses, cattle, and hogs; Failing to restrain livestock at least 25 feet from all property that is not devoted to the keeping of domestic livestock; (4) Building an accessory structure taller than 15 feet in height; (5) Diverting the normal flow of surface water.

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369 S.W.3d 137  
Supreme Court of Texas.

Kerry HECKMAN, et al., on behalf  
of themselves and all other persons  
similarly situated, Petitioners,

v.

WILLIAMSON COUNTY,  
et al., Respondents.

No. 10-0671.

|  
Argued Nov. 9, 2011.

|  
Decided June 8, 2012.

### Synopsis

**Background:** Named plaintiffs, who had previously been charged with misdemeanor offenses carrying possibility of confinement, filed § 1983 civil rights action on behalf of a putative class against county, asserting a denial of class members' right to court-appointed counsel, to self-representation, and to open-court proceedings. The District Court, Williamson County, 277th Judicial District, Joseph H. Hart, J., denied county's plea to the jurisdiction. County filed interlocutory appeal. The Court of Appeals, 368 S.W.3d 1, Bob Pemberton, J., vacated district court's order and dismissed plaintiffs' claims for lack of subject matter jurisdiction. Plaintiffs petitioned for review.

**Holdings:** The Supreme Court, Willett, J., held that:

[1] whether named plaintiffs had justiciable interest in putative class action was not a "criminal law matter," but, rather, a civil law matter, such that the Supreme Court had appellate jurisdiction over the question;

[2] where plaintiffs seek to represent a class, a plaintiff need not have standing on each and every one of the class's claims in order to satisfy the standing requirement, and, so long as an individual plaintiff has standing on some claim, he has standing to pursue class certification as to that claim;

[3] named plaintiff pleaded jurisdictional facts sufficient to establish his individual standing on right-to-counsel claim;

[4] named plaintiff had standing to bring claim that county violated his right to self-representation;

[5] one named plaintiff failed to establish injury-in-fact element of individual standing on claim that county violated his right to open-court proceedings, but another named plaintiff did satisfy that element;

[6] as a matter of apparent first impression, there is a state-law "inherently transitory claims" exception to the mootness doctrine that would otherwise require dismissal when claims of named plaintiffs become moot before trial court decides whether to certify a class;

[7] named plaintiffs' claims satisfied "short duration" requirement for the inherently-transitory-claims exception to mootness; and

[8] remand to trial court was required for a determination of whether named plaintiffs' claims had been mooted by a recently enacted statute and by changes in county's official policies since suit was filed.

Decision of Court of Appeals reversed; case remanded to district court.

West Headnotes (55)

[1] **Courts**  Review by or certificate to Supreme Court by Court of Civil Appeals of questions where its decision conflicts with or overrules that of another Court of Civil Appeals or that of the Supreme Court

Though ordinarily lacking jurisdiction over an appeal from an interlocutory order, the Supreme Court had appellate jurisdiction, because on a conflict with its prior decisions, over decision of Court of Appeals that held on an interlocutory appeal that because no named plaintiff in putative class action had standing on all of class's claims, no named plaintiff had standing at all; Supreme Court had previously held that a named

plaintiff's lack of standing to bring some, but not all, of his claims just deprived trial court of jurisdiction over those discrete claims. V.T.C.A., Government Code § 22.225(b).

1 Cases that cite this headnote

**[2] Courts** Appellate jurisdiction of Supreme Court in general

The jurisdiction of state Supreme Court, like that of all Texas courts, derives from state constitution and statutes. Vernon's Ann.Texas Const. Art. 5, § 3(a).

4 Cases that cite this headnote

**[3] Courts** Determination of questions of jurisdiction in general

Courts always have jurisdiction to determine their own jurisdiction.

11 Cases that cite this headnote

**[4] Courts** Appellate jurisdiction of Supreme Court in general

To determine whether a case is a criminal law matter, such that the Supreme Court lacks appellate jurisdiction over it, the Supreme Court looks to the essence of the case to determine whether the issues it entails are more substantively criminal or civil. Vernon's Ann.Texas Const. Art. 5, § 3(a).

2 Cases that cite this headnote

**[5] Courts** Appellate jurisdiction of Supreme Court in general

Criminal law matters, over which the Supreme Court lacks appellate jurisdiction, include disputes where criminal law is the subject of the litigation; such cases include those which arise over the enforcement of statutes governed by the Texas Code of Criminal Procedure. Vernon's Ann.Texas Const. Art. 5, § 3(a).

4 Cases that cite this headnote

**[6] Courts** Appellate jurisdiction of Supreme Court in general

Criminal law matters, over which the Supreme Court lacks appellate jurisdiction, include disputes which arise as a result of or incident to a criminal prosecution. Vernon's Ann.Texas Const. Art. 5, § 3(a).

2 Cases that cite this headnote

**[7] Courts** Appellate jurisdiction of Supreme Court in general

When interpreting phrase "criminal law matters" to which the Supreme Court's appellate jurisdiction does not extend, the Supreme Court should be mindful of the potential effect of its construction upon the jurisdiction of the Court of Criminal Appeals; by declaring that its appellate jurisdiction reaches a certain matter, the Supreme Court defines, and potentially limits, the jurisdiction of its constitutional sibling. Vernon's Ann.Texas Const. Art. 5, §§ 3(a), 5(c).

2 Cases that cite this headnote

**[8] Courts** Appellate jurisdiction of cases involving Constitution or statutes

Whether named plaintiffs had justiciable interest in putative class action against county on behalf of indigent defendants who were allegedly deprived of right to court-appointed counsel on misdemeanor charges carrying possible confinement, as well as the right to open court proceedings, was not a "criminal law matter," but, rather, a "civil law matter," such that the Supreme Court had appellate jurisdiction over the question, even though some reference to criminal procedural law was necessary in order to answer it; case involved justiciability doctrines deriving from constitutional separation-of-powers and open-courts provisions, and justiciability went to the heart of civil practice. U.S.C.A. Const.Amend. 6; Vernon's Ann.Texas Const. Arts. 1, § 13, 2, § 1, 5, § 3(a); Vernon's Ann.Texas Rules Civ.Proc., Rule 42.

1 Cases that cite this headnote

- [9] **Action** Moot, hypothetical or abstract questions

Justiciability is a matter of concern in every civil case, and remains a live concern from the first filing through the final judgment.

3 Cases that cite this headnote

- [10] **Pleading** Plea to the Jurisdiction

A plea to the jurisdiction challenges the court's authority to decide a case.

59 Cases that cite this headnote

- [11] **Appeal and Error** Mootness, ripeness, finality, and prematurity

**Appeal and Error** Standing

Standing, ripeness, and mootness challenges to named plaintiffs' request for certification of class action on behalf of indigent criminal defendants allegedly deprived by county of constitutional right to court-appointed counsel on misdemeanor charges carrying possible confinement, and of constitutional right to open-court proceedings, were questions of law that the Supreme Court would review de novo. U.S.C.A. Const.Amend. 6.

6 Cases that cite this headnote

- [12] **Courts** Presumptions and Burden of Proof as to Jurisdiction

The burden is on the plaintiff to affirmatively demonstrate the trial court's jurisdiction.

86 Cases that cite this headnote

- [13] **Pleading** Scope of inquiry and matters considered in general

When assessing a plea to the jurisdiction, Supreme Court begins its analysis with the live pleadings; it may also consider evidence submitted to negate the existence of jurisdiction,

and it must consider such evidence when necessary to resolve the jurisdictional issue.

38 Cases that cite this headnote

- [14] **Pleading** Petition, complaint, declaration or other pleadings

In assessing a plea to the jurisdiction, the Supreme Court construes the plaintiff's pleadings liberally, taking all factual assertions as true, and looks to the plaintiff's intent.

64 Cases that cite this headnote

- [15] **Pleading** Plea to the Jurisdiction

Plea to the jurisdiction must be granted if the plaintiff's pleadings affirmatively negate the existence of jurisdiction.

89 Cases that cite this headnote

- [16] **Pleading** Plea to the Jurisdiction

Plea to the jurisdiction must be granted if the defendant presents undisputed evidence that negates the existence of the court's jurisdiction.

20 Cases that cite this headnote

- [17] **Action** Persons entitled to sue

A court has no jurisdiction over a claim made by a plaintiff who lacks standing to assert it.

72 Cases that cite this headnote

- [18] **Action** Persons entitled to sue

**Pretrial Procedure** Want of jurisdiction

If a plaintiff lacks standing to assert one of his claims, the court lacks jurisdiction over that claim and must dismiss it.

58 Cases that cite this headnote

- [19] **Pretrial Procedure** Want of jurisdiction

If the plaintiff lacks standing to bring any of his claims, the court must dismiss the whole action for want of jurisdiction.

30 Cases that cite this headnote

- [20] **Parties** ↗ Representation of class; typicality Standing requirements extend to class actions, and a plaintiff who brings a class action, rather than just suing on his own behalf, must still prove that he individually had standing to sue.

1 Cases that cite this headnote

- [21] **Parties** ↗ Representation of class; typicality The court must consider the threshold question of named plaintiff's standing even before reaching the separate issue of whether it can certify the putative class.

2 Cases that cite this headnote

- [22] **Pretrial Procedure** ↗ Want of jurisdiction A court must dismiss a class action for want of jurisdiction if the named plaintiff entirely lacked individual standing at the time he sued.

1 Cases that cite this headnote

- [23] **Courts** ↗ Decisions of United States Courts as Authority in State Courts

Because standing is a constitutional prerequisite to maintaining a suit under both federal and Texas law, state Supreme Court looks to the more extensive jurisprudential experience of the federal courts on that subject for any guidance it may yield.

2 Cases that cite this headnote

- [24] **Action** ↗ Persons entitled to sue

**Declaratory Judgment** ↗ Proper Parties

**Injunction** ↗ Persons entitled to apply; standing

Whether considering the standing of one plaintiff or many, the court must generally analyze the standing of each individual plaintiff to bring each individual claim he or she alleges when that issue is before the court; an exception to this rule applies where there are multiple plaintiffs in a

case, who seek injunctive or declaratory relief or both, who sue individually, and who all seek the same relief, in which case the court need not analyze the standing of more than one plaintiff, so long as that plaintiff has standing to pursue as much or more relief than any of the other plaintiffs.

11 Cases that cite this headnote

- [25] **Parties** ↗ Representation of class; typicality A plaintiff's burden to establish standing does not decrease just because he brings his suit as a class action; plaintiff must still show that he has an individual, justiciable interest in the case, and he cannot "borrow" standing from the class, nor does he otherwise get a "pass" on standing.

2 Cases that cite this headnote

- [26] **Parties** ↗ Representation of class; typicality Where plaintiffs seek to represent a class, a plaintiff need not have standing on each and every one of the class's claims in order to satisfy the standing requirement, and, so long as an individual plaintiff has standing on some claim, he has standing to pursue class certification as to that claim.

14 Cases that cite this headnote

- [27] **Action** ↗ Persons entitled to sue

State standing doctrine requires a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court.

60 Cases that cite this headnote

- [28] **Action** ↗ Persons entitled to sue

Standing inquiry under state law includes three elements: (1) plaintiff must be personally injured, i.e., must plead facts demonstrating that he, himself, rather than a third party or the public at large, suffered an injury that was concrete and particularized, actual or imminent, not hypothetical; (2) the plaintiff's alleged injury must be fairly traceable to the defendant's conduct; and (3) plaintiff's alleged injury must

be likely to be redressed by the requested relief, and the plaintiff must demonstrate standing separately for each form of relief sought.

68 Cases that cite this headnote

**[29] Action** Persons entitled to sue

Constitutional harms, whether actual or imminent, are sufficient to establish requirement for standing that a plaintiff be personally injured and that the injury be concrete and particularized.

27 Cases that cite this headnote

**[30] Injunction** Persons entitled to apply; standing

If a plaintiff suing in a Texas court requests injunctive relief as well as damages, but the injunction could not possibly remedy his situation, then he lacks standing to bring that claim.

4 Cases that cite this headnote

**[31] Action** Persons entitled to sue

To satisfy redressability, as element of standing, the plaintiff need not prove to a mathematical certainty that the requested relief will remedy his injury, but must simply establish a substantial likelihood that the requested relief will remedy the alleged injury in fact.

10 Cases that cite this headnote

**[32] Action** Persons entitled to sue

The standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.

17 Cases that cite this headnote

**[33] Parties** Representation of class; typicality

To sue on behalf of himself and a putative class, named plaintiff must have had standing at the time he or she joined the suit.

**[34] Civil Rights** Criminal law enforcement; prisons

Named plaintiff in putative class action under § 1983 against county on behalf of indigent criminal defendants who were allegedly deprived of right to court-appointed counsel on misdemeanor charges carrying possible confinement pleaded jurisdictional facts sufficient to establish, for standing purposes, that he suffered from an injury-in-fact at time he sued; plaintiff alleged that he requested court-appointed attorney and provided proof of indigency at his first appearance, that trial court threatened to raise his bond if he did not have attorney at next appearance, and that at time of filing present action he had not been appointed an attorney and charges against him were still pending. U.S.C.A. Const. Amend. 6; 42 U.S.C.A. § 1983.

**[35] Civil Rights** Criminal law enforcement; prisons

Named plaintiff in putative class action under § 1983 against county on behalf of indigent criminal defendants who were allegedly deprived of right to court-appointed counsel on misdemeanor charges carrying possible confinement pleaded jurisdictional facts sufficient to establish, for standing purposes, that his alleged injuries were fairly traceable to county; plaintiff asserted that county was responsible under Texas Fair Defense Act for provision of indigent defense services within its borders, and that had a policy, pattern, and practice of denying legal representation to poor individuals accused of misdemeanor offenses punishable by imprisonment. U.S.C.A. Const. Amend. 6; 42 U.S.C.A. § 1983; V.T.C.A., Government Code §§ 71.061(a), 71.062 (Repealed).

1 Cases that cite this headnote

**[36] Civil Rights** Criminal law enforcement; prisons

Named plaintiff in putative class action under § 1983 against county on behalf of indigent criminal defendants who were allegedly deprived of right to court-appointed counsel on misdemeanor charges carrying possible confinement was not required, in establishing traceability element of individual standing, to show exactly what responsibility the county bore for his alleged injuries, but merely to show that his injuries were fairly traceable to county. U.S.C.A. Const.Amend. 6; 42 U.S.C.A. § 1983.

Named plaintiff pleaded sufficient facts, in putative class action under § 1983 against county on behalf of indigent criminal defendants, to establish injury-in-fact element of standing to bring claim that county violated his constitutional right to self-representation; plaintiff alleged that “court officials” pressured him to plead guilty or no contest to charges against him and encouraged him to speak to prosecutor without first obtaining a knowing and voluntary waiver of his right to counsel. U.S.C.A. Const.Amend. 6; 42 U.S.C.A. § 1983.

**[37] Civil Rights** Liability of Public Employees and Officials

A suit under § 1983 against a government official in his official capacity is not a suit against the official but rather is a suit against the official's office, although such a suit is treated as a suit against a “person” under § 1983 when the plaintiff seeks prospective injunctive relief. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

**[38] Civil Rights** Criminal law enforcement; prisons

For purposes of establishing individual standing, named plaintiff in putative class action under § 1983 against county on behalf of indigent criminal defendants who were allegedly deprived of right to court-appointed counsel on misdemeanor charges carrying possible confinement pleaded jurisdictional facts sufficient to establish that, at least at the time he filed suit, his injuries were likely to be redressed by the requested injunctive and declaratory relief; plaintiff asserted that at the time he filed suit, he still had not been appointed an attorney, or, in another words, that county had violated and was continuing to violate his constitutional right to counsel. U.S.C.A. Const.Amend. 6; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

**[39] Civil Rights** Criminal law enforcement; prisons

**[40] Criminal Law** In general; right to appear pro se

Sixth Amendment to federal constitution implicitly protects a criminal defendant's right to represent himself. U.S.C.A. Const.Amend. 6.

**[41] Criminal Law** Capacity and requisites in general

While a criminal defendant has a right to represent himself, to do so he must first knowingly and voluntarily waive his right to counsel, and a defendant can make the requisite waiver only after having been informed of his constitutional right to an attorney and all that the right entails. U.S.C.A. Const.Amend. 6.

**[42] Civil Rights** Criminal law enforcement; prisons

Named plaintiff, in putative class action under § 1983 against county on behalf of indigent criminal defendants charged with misdemeanor offenses carrying possible confinement, failed to establish injury-in-fact element of individual standing to bring claim that county violated his right to open-court proceedings; plaintiff alleged that county “routinely” deprived criminal defendants of that right, but did not allege that he, personally, was suffering from a deprivation of that right at the time he filed suit or that he faced an imminent deprivation of that right. U.S.C.A. Const.Amend. 6; 42 U.S.C.A. § 1983.

[43] **Criminal Law** Constitutional and statutory provisions

**Criminal Law** Public Trial

Federal constitutional right of a criminal defendant to a speedy and public trial applies to the states. U.S.C.A. Const. Amend. 6.

[44] **Civil Rights** Criminal law enforcement; prisons

Mother whose minor daughter was facing misdemeanor charges pleaded sufficient facts, in putative class action against county under § 1983, to establish for purposes of individual standing to seek declaratory and injunctive relief that mother faced imminent deprivation of her constitutional right to open-court proceedings; at the time that mother joined suit, county had a published policy of preventing any non-defendants from attending a first appearance, and printout from county attorney's website announcing the rule was included in the record. U.S.C.A. Const. Amend. 6; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[45] **Criminal Law** Public Trial

The right to a public trial belongs to members of the public just as it does to the accused. U.S.C.A. Const. Amend. 6.

[46] **Action** Moot, hypothetical or abstract questions

A court generally cannot not decide a case that has become moot during the pendency of the litigation.

38 Cases that cite this headnote

[47] **Action** Moot, hypothetical or abstract questions

A case becomes "moot" if, since the time of filing, there has ceased to exist a justiciable controversy between the parties, that is, if the issues presented are no longer "live," or if the

parties lack a legally cognizable interest in the outcome.

107 Cases that cite this headnote

[48] **Action** Moot, hypothetical or abstract questions

A case is moot when the court's action on the merits cannot affect the parties' rights or interests.

97 Cases that cite this headnote

[49] **Pretrial Procedure** Vexatious or fictitious suit; mootness

**Pretrial Procedure** Want of jurisdiction

If a case is or becomes moot, the court must generally vacate any order or judgment previously issued and dismiss the case for want of jurisdiction.

58 Cases that cite this headnote

[50] **Action** Moot, hypothetical or abstract questions

In a typical civil action, where a solo plaintiff brings a claim on his own behalf, the mootness analysis is usually straightforward: if the plaintiff's individual interest becomes moot, the entire suit ordinarily becomes moot.

1 Cases that cite this headnote

[51] **Action** Moot, hypothetical or abstract questions

There is a state-law "inherently transitory" claims exception to the mootness doctrine that would otherwise require dismissal when claims of named plaintiffs become moot before trial court decides whether to certify a class; to qualify for the exception, named plaintiff must show that claim is one of short duration, and that there likely exists a continuing class of persons suffering the same alleged harm as the named plaintiff.

2 Cases that cite this headnote

**[52] Declaratory Judgment** ➡ Criminal laws

Named plaintiffs' claims for declaratory and injunctive relief, in putative class action against county under § 1983 on behalf of indigent criminal defendants who were allegedly deprived of their right to court-appointed counsel on misdemeanor charges carrying possibility of confinement, satisfied "short duration" element of the "inherently transitory claims" exception to mootness doctrine that would otherwise require dismissal on basis that all named plaintiffs had been appointed counsel after they joined the suit and all criminal charges against them had been resolved. U.S.C.A. Const.Amend. 6; 42 U.S.C.A. § 1983.

official policies since suit was filed; county's assertion of changes in law and written policies did not establish how it actually treated individuals appearing in its courthouses. U.S.C.A. Const.Amend. 6; 42 U.S.C.A. § 1983.

**[53] Action** ➡ Moot, hypothetical or abstract questions

**Appeal and Error** ➡ Want of Actual Controversy

A suit can become moot at any time, including on appeal, and the courts have an obligation to take into account intervening events that may render a lawsuit moot.

32 Cases that cite this headnote

**[54] Action** ➡ Moot, hypothetical or abstract questions

Where a plaintiff challenges a statute or written policy, that challenge may become moot if the statute or policy is repealed or fundamentally altered.

3 Cases that cite this headnote

**[55] Appeal and Error** ➡ Applicable legal theory or standard in general

Remand to trial court was required for a determination of whether § 1983 claims against county by a putative class, consisting of criminal defendants who were allegedly deprived of their constitutional right to court-appointed counsel on misdemeanor charges carrying possibility of confinement, had been mooted by a recently enacted statute and by changes in county's

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### Opinion

Justice WILLETT delivered the opinion of the Court.

A criminal defendant's right to counsel—enshrined in both the United States \***144** and Texas Constitutions—ranks among the most important and fundamental rights in a free society. The plaintiffs in this civil action assert that they, and other similarly situated indigent criminal defendants, have been deprived of that right. The court of appeals dismissed their suit, concluding that the trial court lacked jurisdiction. We disagree. While our Constitution requires vigilance lest courts overstep their jurisdictional bounds, courts also must dutifully exercise jurisdiction rightly theirs. Here, the court of appeals erred in concluding that the plaintiffs lacked standing and that their claims are moot. We reverse the court of appeals' judgment and remand to the trial court for further proceedings.

## I. Background

In 2006, petitioners Kerry Heckman, Monica Maisenbacher, Sylvia Peterson, and Tammy Newberry each faced misdemeanor charges in Williamson County—charges that could lead to up to a year in prison. Each claimed to be unable to afford legal representation. And each claimed that he or she had been, or soon would be, denied his or her right to court-appointed counsel.

They sought relief by initiating this lawsuit pursuant to section 1983 of the Civil Rights Act of 1871. In addition to suing Williamson County, they sued its constitutional county judge,<sup>1</sup> three of its county court at law judges,<sup>2</sup> and its magistrate judge<sup>3</sup>—all in their official capacities.

Heckman, Maisenbacher, Peterson, and Newberry claimed that these defendants (“defendants”) had deprived, conspired to deprive, and allowed others to deprive them of two constitutionally protected rights: the right to counsel and the right to self-representation. Petitioner Jessica Stempko, whose minor daughter was then facing misdemeanor charges in Williamson County, joined them in a third claim: that defendants had deprived them of their constitutionally protected right to open-court proceedings.

These five plaintiffs (“plaintiffs” or “named plaintiffs”) brought these claims not just on their own behalf but for the putative class of all individuals accused of a misdemeanor crime in Williamson County who faced the possibility of confinement and could not afford legal counsel. They sought injunctive and declaratory relief “[t]o stop Defendants’ unconstitutional and unfair practices.”

Defendants filed a plea to the jurisdiction. First, they asserted that the trial court lacked jurisdiction to intervene in equity into pending criminal proceedings. Second, they argued that Heckman, Maisenbacher, and Peterson all lacked standing to bring their claims and that their claims were moot. They introduced undisputed evidence that since joining this suit, those three plaintiffs had each been appointed counsel and, further, that their criminal cases had concluded. Defendants also introduced undisputed evidence that a visiting judge<sup>4</sup> had been the one who refused to provide appointed counsel to Heckman, \*145 Maisenbacher, and Peterson—not any of the defendant county court at law judges. Third, defendants argued that Newberry’s claims and Stempko’s claim were

not ripe because they were based on events that had not yet happened (that is, they were not yet far enough along in the pretrial process to have any grounds to make these claims).

The trial court denied the plea to the jurisdiction. Defendants promptly filed an interlocutory appeal,<sup>5</sup> leading the trial court to stay further proceedings. Consequently, the trial court did not rule on plaintiffs’ petition for class certification—it neither certified the class nor denied certification.

On appeal, defendants renewed their jurisdictional arguments. They also moved to dismiss and filed supplemental briefing, noting that all of plaintiffs’ criminal cases had been resolved and that, beforehand, all of them had been appointed counsel. (In the case of Jessica Stempko, who did not face criminal charges, defendants asserted the same with regard to her daughter.) Finally, they asserted that a number of subsequent developments had mooted the claims of the putative class—Williamson County had revised its policies for appointing legal counsel for indigent misdemeanor defendants, and had hired additional personnel to ensure that those defendants who needed a lawyer received one.

The court of appeals held that none of the named plaintiffs ever had standing to pursue all of the purported class’s claims; for this reason, the court held that none of the named plaintiffs had standing to litigate whether the putative class should be certified. The court held that, for this reason, the claims were moot, as was the suit itself.<sup>6</sup> It vacated the trial court’s denial of defendants’ plea to the jurisdiction and dismissed the suit for want of subject-matter jurisdiction.

Thereafter, we granted plaintiffs’ petition for review.<sup>7</sup>

## II. Appellate Jurisdiction of this Court

Defendants argue that this appeal falls outside the constitutional and statutory scope of our appellate jurisdiction. Because these issues may be dispositive, we consider them first.

### A. Interlocutory Appeals

[1] Ordinarily, this Court lacks jurisdiction over an appeal from an interlocutory order.<sup>8</sup> Here, however, we have jurisdiction over this case because the court of appeals’

decision conflicts with prior decisions of this Court.<sup>9</sup> The court of appeals held that, because no named plaintiff had standing on all of the class's claims, no named plaintiff had standing at all.<sup>10</sup> Previously, we have held that a plaintiff's lack of standing to bring some, but not all, of his claims just deprives the court of jurisdiction over those discrete claims.<sup>11</sup> Given this conflict, we conclude that this case does not fall outside the statutory scope of our appellate jurisdiction over interlocutory appeals.

writ of mandamus, "in criminal law matters."<sup>19</sup> Thus, the Constitution uses the same term to demarcate the end of our appellate jurisdiction and the beginning of our sister court's mandamus jurisdiction. When interpreting "criminal law matters" for purposes of our own jurisdiction, "we should be mindful of the potential effect of our construction" upon the jurisdiction of the Court of Criminal Appeals.<sup>20</sup> By declaring that our appellate jurisdiction reaches a certain matter, we thereby define, and potentially limit, the jurisdiction of our constitutional sibling.<sup>21</sup>

#### \*146 B. "Criminal Law Matters"

We next consider whether this case falls outside the scope of our appellate jurisdiction as delineated by the Texas Constitution. Defendants assert that it does, arguing that Heckman's case amounts to a "criminal law matter." We disagree.

#### 1.

[2] [3] The jurisdiction of this Court—like that of all Texas courts—derives from Texas's Constitution and statutes.<sup>12</sup> Under our Constitution, this Court's appellate jurisdiction "extend[s] to all cases except in criminal law matters."<sup>13</sup> Thus, if defendants are correct and this appeal constitutes a criminal law matter, then we lack the authority to decide it.<sup>14</sup>

[4] [5] [6] No one rule clearly defines the content or contours of "criminal law matters." We do not write on an entirely blank slate, however. To determine whether a case is a criminal law matter, we look to the essence of the case to determine whether the issues it entails are more substantively criminal or civil.<sup>15</sup> Criminal law matters include disputes where "criminal law is the subject of the litigation," such cases include those "which arise over the enforcement of statutes governed by the Texas Code of Criminal Procedure."<sup>16</sup> Criminal law matters also include disputes "which arise as a result of or incident to a criminal prosecution."<sup>17</sup>

[7] In addition to the principles announced in our own caselaw, we find guidance in the decisions of the Court of Criminal Appeals.<sup>18</sup> The Texas Constitution gives that court the authority to issue a variety of writs, including the

#### \*147 2.

[8] In this case, we are asked to consider the issues first raised by defendants' plea to the jurisdiction:

- Did the named plaintiffs lack standing to sue?
- Were their claims not yet ripe?
- Did the mooting of their individual claims render this suit moot?

These are questions of justiciability—a doctrine rooted in the Separation of Powers provision<sup>22</sup> and the Open Courts provision<sup>23</sup> of the Texas Constitution.<sup>24</sup> These constitutional provisions—or, more specifically, the justiciability doctrines of standing, ripeness, and mootness that derive from them—are the subject of this appeal, "not any provision in the Code of Criminal Procedure nor any other criminal statute."<sup>25</sup> Nor must we provide any "construction of a criminal statute" to answer the justiciability questions here.<sup>26</sup> In other words, no "criminal law is the subject of the litigation."<sup>27</sup> Arguably for this reason alone, this case does not present a "criminal law matter."

But beyond this technical analysis, a more fundamental reason supports our conclusion. The Texas Constitution—the source of the requirements of justiciability in Texas—bars our courts from rendering advisory opinions and limits access to the courts to those individuals who have suffered an actual, concrete injury.<sup>28</sup> By raising the issue of justiciability, defendants ask for a determination of whether the named plaintiffs have suffered an actual injury, and whether there exists a live, non-abstract question of law that, if decided, would have a binding effect on the parties. In short, they ask this Court to determine whether this suit is appropriate

for judicial review, or whether the courts should refrain from deciding it.<sup>29</sup>

[9] Thus, the question raised by defendants' plea to the jurisdiction—and the constitutional and pragmatic concerns it engenders—goes to the heart of civil practice. Justiciability is a matter of concern in every civil case,<sup>30</sup> and remains a live concern from the first filing through the final judgment.<sup>31</sup> Accordingly, the body of \*148 Texas jurisprudence on justiciability has developed primarily in this and other courts exercising civil jurisdiction.<sup>32</sup>

This is not to say that justiciability concerns never arise in “criminal law matters” or in cases decided by the Court of Criminal Appeals.<sup>33</sup> However, such concerns would seem to arise rarely, if ever, in classic “criminal proceedings” where a defendant's guilt, innocence, or punishment are at issue,<sup>34</sup> and the relationship between the State and the defendant is “solidly adversarial.”<sup>35</sup>

The question here is not simply the justiciability of an individual plaintiff's claim, but whether multiple individual named plaintiffs have a justiciable interest in obtaining the use of a procedural device unique to civil law: the class action.<sup>36</sup> Questions about the justiciability of a party's motion for class certification do not fit neatly into any of the categories of “criminal law matters” identified by this Court or the Court of Criminal Appeals.<sup>37</sup> Indeed, neither party has identified precedent where the Court of Criminal Appeals even considered issues of justiciability in the class action context. Nor has either party identified precedent in which that court, or this one, held that questions about justiciability are “criminal law matters”—in the class-certification context or otherwise. Nor have we discovered any.

This Court, by contrast, has issued numerous opinions on justiciability generally and specifically in the context of class certification. Given the importance of the subject in civil practice, litigants will no doubt continue to call on us to do so—yet another reason against declaring this a “criminal law matter” and thereby placing it beyond the scope of our appellate jurisdiction. We conclude that, by holding this to be a civil law matter, we preserve our appellate jurisdiction over a fundamental area of civil law while not encroaching on the jurisdiction of our sister court.

### 3.

Defendants nevertheless contend that this is a “criminal law matter” as it arises from a criminal proceeding. Specifically, they assert that the appointment of legal counsel for indigent misdemeanor defendants is a criminal law matter; hence allegations about the constitutionality of such procedures are, themselves, necessarily “criminal law matters.”

\*149 Defendants conflate the merits of the named plaintiffs' claims—which are *not* before this Court—with the justiciability issues which *are* before us. The only question we are asked to decide is whether the named plaintiffs have a justiciable interest in this case. The only relief they seek is for us to reverse the court of appeals' dismissal for want of jurisdiction, and to remand the matter so the trial court can decide whether to certify the class. Indeed, given the procedural posture of this case, this is the only relief plaintiffs are able seek in this Court at this time. We are not asked to decide—nor could we decide—whether to certify the purported class, much less how to adjudicate the merits of plaintiffs' constitutional claims.

Admittedly, to answer the justiciability questions raised here, we must refer to some extent to criminal procedure law. But that fact does not render this case a criminal law matter. More than a century ago, this Court noted that “there are criminal cases which may incidentally involve a question of civil law, and civil cases in which in like manner points of criminal law call for solution.”<sup>38</sup> The Court of Criminal Appeals appears to have arrived at the same conclusion.<sup>39</sup>

Nor is this the first time we have considered a challenge to a lower court's jurisdiction over what may be a “criminal law matter.” In the past, we held that a trial court lacked jurisdiction to issue a declaratory judgment that a penal code provision was unconstitutional or to issue an injunction against its enforcement.<sup>40</sup> We exercised jurisdiction over the jurisdictional question in that appeal, regardless of the fact that the underlying merits question—whether the statute was constitutional—was no doubt itself a “criminal law matter” beyond our appellate jurisdiction.

For similar reasons, the fact that we can only answer the justiciability questions here by referring to criminal law cases does not deprive us of appellate jurisdiction. The matter

before us deals with justiciability, and therefore falls squarely within our constitutional authority.

### III. Standard and Scope of Review

[10] [11] Having determined this case falls within our appellate jurisdiction, we consider now the subject of the dispute: defendants' plea to the jurisdiction. A plea to the jurisdiction challenges the court's authority to decide a case.<sup>41</sup> Here, defendants challenge plaintiffs' standing as well as the ripeness of their claims, and \*150 further assert their claims are moot. These are questions of law we review *de novo*.<sup>42</sup>

[12] [13] [14] The burden is on the plaintiff affirmatively demonstrate the trial court's jurisdiction.<sup>43</sup> When assessing a plea to the jurisdiction, our analysis begins with the live pleadings.<sup>44</sup> We may also consider evidence submitted to negate the existence of jurisdiction—and we must consider such evidence when necessary to resolve the jurisdictional issue.<sup>45</sup> We construe the plaintiff's pleadings liberally, taking all factual assertions as true, and look to the plaintiff's intent.<sup>46</sup>

[15] [16] We must grant the plea to the jurisdiction if the plaintiff's pleadings affirmatively negate the existence of jurisdiction.<sup>47</sup> And we must grant the plea if the defendant presents undisputed evidence that negates the existence of the court's jurisdiction.<sup>48</sup>

### IV. Standing

The court of appeals held that not one of the named plaintiffs had standing to pursue *all* of the putative class's claims. The court therefore held that *none* of the named plaintiffs had standing to pursue *any* of the class's claims, or to litigate whether the class should be certified.

According to plaintiffs, the court of appeals has dramatically rewritten the rules of standing. Plaintiffs argue that the court's holding "make[s] pleading an all-or-nothing game where either all claims proceed or no claims proceed." And in any event, plaintiffs assert that several of the named plaintiffs did have standing to pursue each and every one of the class's claims.

Thus, the threshold standing question here is whether a named plaintiff must have standing on *all* of the class's claims in order to pursue *any* of them. We hold that he does not. We further hold, for each claim, that at least one named plaintiff in this case had standing to assert that claim. Thus, the court of appeals erred in dismissing this suit on standing grounds.

#### A. General Principles

[17] [18] [19] Standing is a constitutional prerequisite to suit.<sup>49</sup> A court has no jurisdiction over a claim made by a plaintiff who lacks standing to assert it.<sup>50</sup> Thus, if a plaintiff lacks standing to assert one of his claims, the court lacks jurisdiction over that claim and must dismiss it.<sup>51</sup> Similarly, if the plaintiff lacks standing to bring *any* of his claims, the court must dismiss \*151 the whole action for want of jurisdiction.<sup>52</sup>

[20] [21] [22] The standing requirements extend to class actions.<sup>53</sup> A plaintiff who brings a class action, rather than just suing on his own behalf, must still prove that he individually had standing to sue.<sup>54</sup> The court must consider this threshold question even before reaching the separate issue of whether it can certify the putative class.<sup>55</sup> Just as it must dismiss a case where the plaintiff lacks standing to bring any of his claims, a court must dismiss a class action for want of jurisdiction if the named plaintiff entirely lacked *individual* standing at the time he sued.<sup>56</sup>

These principles provide a starting point for our analysis, but this case raises a further question: What happens if a named plaintiff has individual standing on some, but not all, of the putative class's claims? We turn to this question next.

#### B. Must a Plaintiff Have Standing on Each Claim of the Purported Class to Pursue Certification?

The court of appeals concluded that the named plaintiffs, "both individually and collectively, have never had standing to pursue the full claims of the putative class.... Thus, there is no plaintiff with standing to pursue the claims of the putative class, nor can there be."<sup>57</sup> Put simply, the court held that a plaintiff cannot seek class certification on *any* claim unless he has individual standing on *every* claim.<sup>58</sup>

We disagree. We see no reason why a plaintiff who seeks to represent a class, but lacks standing on some of the purported class's claims, completely lacks standing to bring *any* claims.

## 1.

The result we arrive at today is implicit in our earlier decisions. In the past, for example, we considered appeals where the trial court had already decided the question of certification and where the named plaintiffs brought similar but not identical claims—and thus had suffered similar but not identical injuries. The solution there, however, was not to dismiss the entire suit on standing grounds; rather, the solution was for the trial court to certify subclasses to ensure that a named plaintiff had suffered the same injury as the class or subclass.<sup>59</sup>

[23] Federal courts' decisions, too, support our conclusion today.<sup>60</sup> Defendants cite decisions from the U.S. Courts of Appeals for the Fifth and Eleventh Circuits \*152 to support their argument that standing is an all-or-nothing enterprise, but these decisions generally support our position, not theirs—and do so in explicit terms.<sup>61</sup> “For every claim, a named plaintiff with standing” appears to be the consensus rule from these federal decisions—a claim survives the initial standing inquiry so long as at least one named plaintiff has standing to bring it.<sup>62</sup> Then, after this inquiry, the court can consider whether the named plaintiff satisfies the requirements of “commonality,” “typicality,” “adequacy,” and the other prerequisites for certifying a class action.<sup>63</sup>

## 2.

[24] Indeed, our holding—that a plaintiff need not have standing on *all* claims of the purported class in order to seek class certification—is logically required by an implicit but fundamental principle of our standing jurisprudence. Whether considering the standing of one plaintiff or many, the court must analyze the standing of each individual plaintiff to bring each individual claim he or she alleges when that issue is before the court.<sup>64</sup> This principle flows from two sources. First, a plaintiff must demonstrate that the court has jurisdiction \*153 over (and the plaintiff has standing to bring) each of his claims;<sup>65</sup> the court must dismiss

those claims (and only those claims) over which it lacks jurisdiction.<sup>66</sup> Second, a plaintiff must demonstrate that he, himself, has standing to present his claims; the court must dismiss a plaintiff who lacks standing.<sup>67</sup> Thus, each party must establish that he has standing to bring each of the claims he himself alleges—meaning the court must assess standing plaintiff by plaintiff, claim by claim.

The U.S. Supreme Court has analyzed the standing of multiple named plaintiffs in class actions on a plaintiff-by-plaintiff, claim-by-claim basis. It has concluded that such analysis is necessary for two reasons. First, *plaintiff-by-plaintiff* analysis is necessary to ensure that the court exercises jurisdiction only over plaintiffs who individually have standing.<sup>68</sup> “That a suit may be a class action ... adds nothing to the question of standing.”<sup>69</sup> That Court, like this one, has held that named plaintiffs who seek to represent a class “must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.”<sup>70</sup>

Second, *claim-by-claim* analysis is necessary to ensure that a particular plaintiff has standing to bring each of his particular claims. “[S]tanding is not dispensed in gross.... [N]or does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.”<sup>71</sup> Other federal courts—including the Fifth Circuit—have come to the same conclusion.<sup>72</sup>

[25] We see no reason why the rule should be different whether one plaintiff or many file suit, or whether that suit is brought as an individual or class action. A plaintiff's burden to establish standing does not decrease just because he brings his suit as a class action. He must still show that he has an individual, justiciable interest in the case; the named plaintiff \*154 cannot “borrow” standing from the class, nor does he otherwise get a “pass” on standing.<sup>73</sup> This is so because the motivating concern behind the standing inquiry is exactly the same regardless of the form of the suit: “A court that decides a claim over which it lacks jurisdiction violates the constitutional limitations on its authority, even if the claim is denied.... [T]he denial of a claim on the merits is not an alternative to dismissal for want of jurisdiction merely because the ultimate result is the same.”<sup>74</sup> But this reasoning cuts the other way, too: The fact that a suit is brought as a

class action should not *increase* the named plaintiff's burden to establish standing—say, by requiring him to establish standing on each and every one of the class's claims—any more than it *decreases* his burden. The motivating concern remains the same: to determine whether the court has the constitutional authority to decide the case (or the claim) before it.<sup>75</sup> The burden thus remains the same, too.

### 3.

[26] In short, we hold that where plaintiffs seek to represent a class, a plaintiff need not have standing on each and every one of the class's claims in order to satisfy the standing requirement. So long as an individual plaintiff has standing on *some* claim, he has standing to pursue class certification as to that claim.

## C. Standing of the Parties

We now consider plaintiffs' individual standing. If at least one named plaintiff had individual standing to bring at least one claim, then the court of appeals erred in holding that none of the plaintiffs had standing to sue and therefore erred by dismissing the entire case on that basis.

### 1.

[27] In Texas, the standing doctrine requires a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court.<sup>76</sup> This parallels the federal test for Article III standing: “A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.”<sup>77</sup> Given the parallels between that test and our own, we turn for guidance to precedent from the U.S. Supreme Court, which has elaborated on standing's three elements:

First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical.’” Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly ... trace[able] to the challenged action of the defendant, and not ... th[e]

result [of] the independent action of some third party not before the court.” Third, it must be “likely,” as opposed to merely “speculative,” that \*155 the injury will be “redressed by a favorable decision.”<sup>78</sup>

[28] [29] Under Texas law, as under federal law, the standing inquiry begins with the plaintiff's alleged injury. The plaintiff must be *personally* injured—he must plead facts demonstrating that he, himself (rather than a third party or the public at large), suffered the injury.<sup>79</sup> After all, our Constitution opens the courthouse doors only to those who have or are suffering an injury.<sup>80</sup> As for the injury itself, it “must be concrete and particularized, actual or imminent, not hypothetical.”<sup>81</sup> Constitutional harms—whether actual or imminent—are sufficient.<sup>82</sup>

The second element of the standing test requires that the plaintiff's alleged injury be “fairly traceable” to the defendant's conduct.<sup>83</sup> The Supreme Court has described this requirement as ensuring that a “court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court.”<sup>84</sup> This Court, too, has previously looked to see whether a defendant's conduct has personally injured the plaintiff as part of the standing inquiry.<sup>85</sup> While it might not be intuitively obvious to think of “traceability” as a part of the standing analysis, “[t]he underlying concerns ... are similar. Just as there must be a means of identifying proper plaintiffs, so there must be a means of identifying proper defendants.”<sup>86</sup>

[30] [31] The third element of standing requires that the plaintiff's alleged injury be “likely to be redressed by the requested relief,”<sup>87</sup> and the plaintiff “must demonstrate standing separately for each form of relief sought.”<sup>88</sup> The Supreme Court's description of this element is consonant with Texas law.<sup>89</sup> If, for example, a plaintiff suing in a Texas court requests injunctive relief as well as damages, but the injunction could not possibly remedy his situation, then he lacks standing to bring that claim.<sup>90</sup> To satisfy redressability, the plaintiff need not prove to a mathematical certainty that the requested relief will remedy his injury—he must simply establish a “substantial likelihood that the requested relief will remedy the alleged injury \*156 in fact.”<sup>91</sup>

[32] The standing inquiry “requires careful judicial examination of a complaint's allegations to ascertain whether

the particular plaintiff is entitled to an adjudication of the particular claims asserted.”<sup>92</sup>

## 2.

In this case, four plaintiffs (Heckman, Maisenbacher, Peterson, and Newberry) sued six defendants (Williamson County, its constitutional county judge, three of its county court at law judges, and its magistrate judge, all in their official capacities), claiming that defendants violated three of their constitutional pretrial rights (counsel, self-representation, and open-court proceedings). A fifth plaintiff (Stempko) joins in this last claim.

[33] Because they sued on behalf of themselves and a putative class, at least one named plaintiff must have had standing at the time he or she joined this suit.<sup>93</sup> We begin our standing analysis with Heckman and his claims.

### a. Right-to-Counsel Claim

Heckman claims that defendants violated his right to counsel under the U.S. Constitution<sup>94</sup> and the Texas Constitution.<sup>95</sup> This right attaches when the criminal defendant first appears before a judicial officer.<sup>96</sup> Pleading under section 1983 of the Civil Rights Act of 1871,<sup>97</sup> Heckman asserts that defendants, “acting under color of the laws of the State of Texas, have deprived, and conspired to deprive, and have allowed to be deprived, indigent persons accused of crimes in Williamson County for which there is a possibility of imprisonment as punishment of their right to counsel.” We conclude Heckman pleaded facts sufficient to establish that he had standing on this claim at the time of filing.

#### i. Injury

[34] Heckman claims that at his first appearance,<sup>98</sup> he was not told about his right to a court-appointed attorney or the standards for determining eligibility for court-appointed counsel, or told how to apply for one. He asserts that he requested a court-appointed attorney, informed the court that he could not afford one on \*157 his own, and provided proof of his indigency; in response, the court allegedly implied that Heckman did not look like he would qualify for court-

appointed counsel because he looked healthy enough to work and was wearing nice clothes. Heckman claims that the court did not ask him any questions about his ability to pay for an attorney. The court allegedly threatened Heckman that it would raise his bond if he did not have an attorney at his next appearance. Notwithstanding his request, at the time of filing Heckman had not been appointed an attorney and the charges against him were still pending.

Defendants have not offered any evidence to refute these jurisdictional facts. Rather, they contend that Heckman's right-to-counsel claims were rendered moot by subsequent events. But subsequent events have no effect on whether, at the time of filing, Heckman was suffering from an injury sufficient to give him standing to sue. That is our inquiry here.<sup>99</sup>

We conclude that Heckman has pleaded jurisdictional facts sufficient, for standing purposes, to establish that at the time he sued he was suffering from an injury-in-fact. The facts are sufficiently personal to him (rather than a third party or the general public);<sup>100</sup> they are concrete, particularized and definite because he already suffered them (and was continuing to suffer them);<sup>101</sup> and they are an invasion of a specific right —Heckman's individual, constitutional right to counsel.

#### ii. Traceability

[35] Heckman levels his right-to-counsel claim against all six defendants. With regards to Williamson County, he asserts it “is responsible for the provision of indigent defense services within its borders.” Heckman traces this responsibility to the Texas Fair Defense Act<sup>102</sup> which, according to Heckman, has delegated to the various counties the responsibility of providing effective counsel to indigent individuals who are entitled to it. Heckman asserts that “Williamson County has a policy, pattern, and practice of denying legal representation to poor individuals accused of misdemeanor offenses punishable by imprisonment.”

[36] We conclude that Heckman has pleaded facts sufficient, for standing purposes, to establish that his alleged injuries maybe “fairly trace [d]” to Williamson County.<sup>103</sup> We note that Heckman has not shown exactly what responsibility Williamson County bears for his alleged injuries. But he is not required to do so at this stage in the litigation.<sup>104</sup> He

must merely show that his injuries are “fairly traceable” to defendants. Heckman has done so here as to the County.<sup>105</sup>

**\*158** With regards to the other defendants—Williamson County's constitutional county judge, three of its county court at law judges, and its magistrate judge—we note that they vigorously deny having personally committed any constitutional deprivations. They assert that, to the extent Heckman was denied counsel, this was attributable to the actions of a visiting judge from another county.<sup>106</sup> Plaintiffs respond that the alleged deprivations were the result of a custom or practice carried out in the courts of the named defendants.

[37] Regardless of who is correct (both sides may be), we note that plaintiffs indisputably have sued the individual judges only in their official capacities. A suit under section 1983 against a government official in his official capacity “is not a suit against the official but rather is a suit against the official's office,” although such a suit is treated as a suit against a “person” under section 1983 when the plaintiff seeks prospective injunctive relief, as plaintiffs seek in this suit.<sup>107</sup>

Finally, our decision today should not be read to suggest any opinion about whether plaintiffs' allegations against these particular judges have merit.

### iii. Redressability

[38] Heckman, like the other named plaintiffs, sought injunctive and declaratory relief to remedy the alleged injuries to his right to counsel.

We conclude that Heckman has pleaded sufficient facts to establish that, at least at the time of filing, his injuries were “likely to be redressed by the requested relief.”<sup>108</sup> In fact, this is true of both forms of relief sought. As we noted above, Heckman asserts that at the time he joined this suit, he still had not been appointed an attorney—in other words, that defendants had violated and were continuing to violate his constitutional right to counsel. Heckman sought a declaration that defendants' practice of denying court-appointed counsel to a person who posts bond violated his rights.<sup>109</sup> He also sought an injunction which, in relevant part, would have required the court to fairly evaluate his request for court-appointed counsel and, if appropriate, to appoint a lawyer to represent him.<sup>110</sup> Each form of relief would have remedied,

in some way, Heckman's alleged injury. Therefore, each independently satisfies the redressability requirement.

**\*159** Because Heckman has established injury, traceability, and redressability, he had standing to claim that defendants violated his constitutional right to counsel at the time he sued.

### b. Self-Representation Claim

[39] [40] Heckman claims that defendants “deprived and conspired to deprive” him of his constitutional right to represent himself. The U.S. Constitution implicitly protects this right,<sup>111</sup> and the Texas Constitution does so explicitly.<sup>112</sup>

In plaintiffs' second amended class action petition (their live pleading), Heckman claims that “court officials” pressured him to plead guilty or no contest to the charges against him and encouraged him to speak with a prosecutor without the aid of an attorney. His assertion appears to be that these actions, combined with defendants' ongoing violation of his right to counsel, violated his constitutional right to represent himself.

[41] The legal theory behind this claim isn't exactly clear from the live pleadings, but plaintiffs' briefs provide some guidance. The argument appears premised on the rule that, while a criminal defendant has a right to represent himself, to do so he must first knowingly and voluntarily waive his right to counsel.<sup>113</sup> And, Heckman notes, a criminal defendant can make the requisite waiver only after having been informed of his constitutional right to an attorney—and all that right entails.<sup>114</sup>

We conclude that Heckman has pleaded facts sufficient to establish an injury-in-fact. As for “traceability,” the analysis that applied to Heckman's right-to-counsel claim applies equally here, given that this claim is based in part on that one. Finally, redressability is satisfied as it appears reasonable to assume that the same relief analyzed above had a likelihood of remedying this alleged injury.<sup>115</sup>

Echoing the court of appeals, defendants argue that Heckman cannot claim a violation of his right to self-representation because he never asked to represent himself—rather, he requested court-appointed counsel.<sup>116</sup> But this misses the thrust of Heckman's argument. According to Heckman, defendants simultaneously misinformed (or under-informed) him of his right to counsel and denied his request for court-

appointed counsel, yet encouraged or forced him to do certain acts (enter a plea, speak unrepresented with the prosecution) that constitute self-representation. The argument is that these actions—forcing Heckman to represent himself without first obtaining a knowing and voluntary waiver—constitute a violation of his right to self-representation.

Assuming as we must that all his factual assertions are true (unless disproven by defendants), and making all reasonable assumptions in his favor, we conclude that Heckman had standing to bring this claim when he filed suit.

#### \*160 c. Open-Courts Claim

[42] [43] Heckman claims that defendants violated his right to open-court proceedings. The U.S. Constitution explicitly guarantees public proceedings for a criminal defendant.<sup>117</sup> Heckman asserts that the Texas Constitution does the same.<sup>118</sup> Here, Heckman claims that defendants “routinely” deprive criminal misdemeanor defendants of these rights by “acquiescing in or condoning the prohibition or prevention of members of the public from entering and observing proceedings in which persons are accused of violating the criminal laws of the State of Texas.”

We conclude that Heckman has failed to establish the requisite injury-in-fact: He has not alleged that he, personally, was suffering from a deprivation of his right to open-court proceedings at the time he filed suit, or that he faced an imminent deprivation of this right. In their live pleading, plaintiffs allege that such deprivations occur in Williamson County during magistration and during the first appearance docket.<sup>119</sup>

[44] [45] But Heckman had already undergone both of these proceedings by the time he filed suit, meaning he no longer suffered from this alleged injury. This in turn means that the alleged prior deprivations of his right to open-court proceedings cannot provide a basis for his claim for prospective relief: Because we do not assume recidivism, we cannot assume that he may undergo these alleged deprivations again in the future.<sup>120</sup> Further, Heckman did not attempt to demonstrate that he might be deprived of this right at any future proceeding—that is, any proceeding that comes after the first appearance docket. Under our standing jurisprudence, a plaintiff must plead facts sufficient to demonstrate that he, himself, has suffered or will imminently

suffer an injury—not that other people did (or will).<sup>121</sup> Heckman's failure to do so deprives him of standing to bring this claim. Because he has failed to show the requisite injury-in-fact, we need not consider the other elements of the standing test.<sup>122</sup>

#### \*161 3.

In sum, we conclude that at the time he joined this suit, Heckman had standing to claim that Williamson County violated his right to counsel and his right to self-representation. In light of our holding that a named plaintiff need not have standing on every claim of the putative class, we hold that Heckman's standing on these claims gave him standing to pursue certification of the putative class.

The court of appeals concluded that none of the named plaintiffs had individual standing to sue. The fact that Heckman did have standing on some claims is sufficient to conclude that the court of appeals erred. Therefore, we need not determine what claims, if any, the other named plaintiffs had standing to bring and whether those claims were ripe. We remand the remaining standing issues to the trial court, which must consider these issues before proceeding to the question of certification.<sup>123</sup>

#### V. Mootness

The court of appeals concluded that this suit is moot.<sup>124</sup> Defendants assume that position in this Court. They argue that plaintiffs' individual claims became moot once they were appointed counsel and certainly once their criminal cases ended. Defendants further argue that, in any event, the claims of the entire putative class are now moot in light of the changes Williamson County has made to its counsel-appointment policies. Finally, defendants argue that none of the exceptions to mootness apply here.

We disagree. While plaintiffs' individual claims are now moot, that does not dispose of this case. In the past, we have recognized—but have not adopted—exceptions to mootness in the class action context.<sup>125</sup> Today, we adopt and apply such an exception, applicable to claims that are inherently transitory.

However, we are unable to conclude whether these claims qualify for the exception in light of intervening events in Williamson County. Therefore, we remand to the trial court to determine whether there likely still exists a class of individuals suffering from the same alleged deprivations of constitutional rights.

### \*162 A. General Principles

[46] [47] [48] [49] Just as the Texas Constitution bars our courts from deciding a case when the plaintiff lacks standing,<sup>126</sup> similarly, a court cannot decide a case that has become moot during the pendency of the litigation.<sup>127</sup> A case becomes moot if, since the time of filing, there has ceased to exist a justiciable controversy between the parties—that is, if the issues presented are no longer “live,” or if the parties lack a legally cognizable interest in the outcome.<sup>128</sup> Put simply, a case is moot when the court’s action on the merits cannot affect the parties’ rights or interests.<sup>129</sup> If a case is or becomes moot, the court must vacate any order or judgment previously issued and dismiss the case for want of jurisdiction.<sup>130</sup>

Here, defendants assert—and plaintiffs concede—that all of plaintiffs’ individual claims have become moot since they joined this lawsuit. We agree. After joining this suit, each of the named plaintiffs was appointed counsel. Thus, they could no longer claim that defendants were still violating their constitutional right to court-appointed counsel. Furthermore, in the years since plaintiffs filed this suit, all of the criminal cases against them have been resolved. As a result, they no longer have a cognizable interest in obtaining injunctive or declaratory relief from defendants’ alleged violations of their, and the putative class’s, criminal procedure rights.<sup>131</sup> And because the only relief plaintiffs sought was injunctive and declaratory in nature—that is, they did not seek damages—the individual named plaintiffs no longer have a cognizable interest in the outcome of the case.

Under normal circumstances, we would dismiss for want of jurisdiction.<sup>132</sup> In this case, however, plaintiffs sought class certification. They claim that despite the mooting of their *individual* claims, the relation-back exception saves the *lawsuit* itself from being moot. We turn to this question next.

### B. Exceptions to Mootness in Class Actions

[50] In a typical civil action, where a solo plaintiff brings a claim on his own behalf, the mootness analysis is usually straightforward: If the plaintiff’s individual interest becomes moot, the entire suit ordinarily becomes moot. In a class action, however, the plaintiff brings a claim not just on his own behalf, but on behalf of an entire class of similarly-injured individuals. There, the named plaintiff’s individual interest can become moot without necessarily affecting the class’s interest in how the suit turns out. If a class of plaintiffs continues to have a live claim against the defendant notwithstanding the mooting of the named plaintiff’s claim, then there will exist a tension between the mootness of the named plaintiff’s individual interest on the one hand, and the continuing vitality of the class’s claim on the other.<sup>133</sup>

The existence of that tension leads to the question of whether there should be an exception to mootness in such circumstances. Indeed, the mootness question in this case is a by-product of that tension: Should a class action lawsuit survive when the individual claim of the named plaintiff becomes moot? This appears to be a question of first impression in this Court. By contrast, federal courts have extensively explored mootness in the class action context and have developed a body of exceptions that alleviate some of this tension. We therefore turn to their decisions for guidance.<sup>134</sup>

#### 1.

Federal caselaw draws a bright line between two categories of class actions: those where the named plaintiff’s interest becomes moot *before* the court decides on certification, and those where that happens *afterwards*. While they treat the two categories somewhat differently,<sup>135</sup> federal courts have carved out exceptions to mootness in each. Where, as here, the individual claims of the named plaintiffs become moot before the trial court decides whether to certify the class, the class action may still survive so long as it fits the rubric of one of the courts’ limited exceptions.<sup>136</sup>

One such exception applies to “inherently transitory” claims. This exception is premised on the idea that some claims, by their nature, are so short-lived that it may be impossible for the trial court to decide on certification before the named

plaintiff's individual claims become moot.<sup>137</sup> At the same time, regardless of the mooting of the named plaintiff's claims, there continues to exist a population of individuals who suffer from the same alleged harms and therefore have the same inherently transitory claims against the same defendant.<sup>138</sup> Such a claim, therefore, would apply to many people, yet simultaneously would never be subject to judicial review because it would continuously become moot before a judge could certify the putative class.

\***164** Thus the U.S. Supreme Court has applied an exception to mootness to prevent such claims—and the underlying behavior of the defendants—from completely evading review by the courts. The exception is available where a population as a whole retains a live claim against the defendant, but the individual membership of that population is always changing due to the short-lived nature of the claim.<sup>139</sup>

The mechanism that animates this exception is the relation-back doctrine: The court's decision on certification is deemed to "relate back" to the moment when the named plaintiff first filed the suit—a time when there still existed a live dispute between the named plaintiff and the defendant.<sup>140</sup> Relating class certification back to the filing of the class complaint means the named plaintiff is deemed to have standing to litigate the certification question, even though his individual claims are moot.<sup>141</sup> By its terms, however, "relation back" is not available in a case where the named plaintiff lacked standing from the beginning—in such a case, there was no live controversy between the parties, completely depriving the court of jurisdiction.<sup>142</sup> The relation-back doctrine puts the case in the framework discussed above, whereby the subsequent mooting of the named plaintiff's individual claim, after a decision on certification, does not necessarily moot the entire class action.

We note that the exception for "inherently transitory" claims is different and distinct from the exception for claims that are "capable of repetition, yet evading review,"<sup>143</sup>—an exception to mootness which we have previously recognized.<sup>144</sup> The two are similar in that the latter, like the former, requires a claim that is short-lived.<sup>145</sup> The two exceptions differ, however, in that the "capable of repetition" exception generally applies only if the plaintiff can show that the claim is capable of repetition *as to him*.<sup>146</sup>

Thus, to qualify for the exception for "inherently transitory" claims, the named plaintiff must show two things: First, that \***165** the claim is one of short duration,<sup>147</sup> and second, that there likely exists a continuing class of persons suffering the same alleged harm as the named plaintiff.<sup>148</sup>

## 2.

[51] We adopt the federal exception to mootness for "inherently transitory" claims. As discussed above, Texas courts generally lack the authority to decide a case if it ceases to be "live" or if the parties no longer have a cognizable interest in the outcome of the case.<sup>149</sup> However, we conclude that the "inherently transitory" claims exception, as described above, ensures that there remains a live interest between the class of affected individuals—thereby satisfying constitutional justiciability concerns. And, like the exception for claims that are "capable of repetition yet evading review," this exception also enables our courts to review claims of governmental deprivation of constitutional rights that might otherwise be unreviewable.

## C. Application

[52] Here, we conclude that plaintiffs' claims are sufficiently short-lived to satisfy the first element of the exception to mootness for inherently transitory claims. However, in light of the intervening events noted by defendants, we are unable to determine whether the claims of the putative class are now moot. Thus we are unable to determine whether the claims here satisfy the second element of the exception, or whether there no longer exists a class having these same constitutional claims.

## 1.

The claims at issue—that defendants violated plaintiffs' constitutional rights to counsel, self-representation, and open courts—satisfy the first element of the exception. As the U.S. Supreme Court has noted, "criminal trials are typically of 'short duration.'"<sup>150</sup> Indeed, of the four underlying criminal cases that gave rise to this civil suit, three ended well before the trial court ruled on defendants' plea to the jurisdiction—much less even considered the petition for certification.<sup>151</sup>

Elsewhere, we have noted that an inmate's time in jail "may be so short that it would be unlikely" for him to be able to challenge his prison \*166 conditions without his challenge becoming moot.<sup>152</sup> The U.S. Supreme Court has come to the same conclusion when faced with challenges to pretrial detention,<sup>153</sup> and to parole release guidelines.<sup>154</sup> Thus we conclude that plaintiffs' right-to-counsel, self-representation, and open-courts claims "are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires."<sup>155</sup>

## 2.

However, we are unable to determine whether plaintiffs' claims satisfy the second element of the "inherently transitory" exception. On the one hand, plaintiffs' pleadings indicate that there was a widespread, systematic "custom or practice" in Williamson County of depriving indigent misdemeanor defendants of various pre-trial constitutional rights. By itself, this would appear to be enough to establish the alleged violations are likely to recur with regards to other members of an enduring class of individuals.<sup>156</sup>

On the other hand, defendants point to a number of recent changes in the law and in the County. All of these changes occurred after plaintiffs sued. Defendants assert these changes have mooted this suit by remedying all of the claims of the putative class.

First, defendants apparently have adopted a new policy for appointing counsel to indigent criminal defendants in Williamson County.<sup>157</sup> Defendants assert this new plan provides additional protections for anyone needing a court-appointed attorney. Next, they point to a recently enacted statute that changed the requirements for appointing counsel to indigent defendants,<sup>158</sup> and to recent federal court opinions that have changed the law governing indigent defense.<sup>159</sup> Defendants assert that the new policy complies with these changes. This suit was initiated when another policy was in place—now that the County has a new policy, defendants argue that plaintiffs must initiate a new suit if they want to bring their constitutional claims. Finally, defendants assert that Williamson County has hired an additional "magistrate lawyer" as well as an "indigent defense coordinator to ensure that everyone who is entitled to a court-appointed attorney

and requests [same] will get one." All of these intervening events, according to defendants, have mooted the class's claims and thus mooted this class action.

[53] [54] We disagree. Defendants are correct that a suit can become moot at any time, including on appeal, and we agree that the courts have an obligation to take into account intervening events that may \*167 render a lawsuit moot.<sup>160</sup> Further, defendants are right that where a plaintiff challenges a statute or written policy, that challenge may well become moot if the statute or policy is repealed or fundamentally altered.<sup>161</sup>

But here, defendants' bald assertion that they are now in compliance with the law is simply not enough to establish that the claims of the putative class are now moot. The focus of plaintiffs' complaint is on defendants' *actions* and *behavior*; not their written policies. Nowhere in their pleadings do they assert that the written policies in place are somehow unconstitutional. Plaintiffs allege, after all, that defendants' "custom and practice" is to systematically and deliberately deprive indigent misdemeanor defendants of their constitutional rights. This allegation no more hinges on the constitutionality of the current official policy than it did on the previous one.

Indeed, plaintiffs might argue that defendants violated their constitutional rights *in spite of* the then-existing policy. Thus, the existence of new written policies may have no practical effect on how defendants actually treat individuals who appear in Williamson County's courtrooms. Defendants may be depriving indigent criminal defendants of their constitutional pre-trial rights now just as plaintiffs allege they did in the past.

Similarly, bald statements that Williamson County has hired additional staff, allegedly for the purpose of helping provide legal advice to indigent criminal defendants, falls well short of establishing that all of the class's claims are now moot.

[55] We therefore remand this matter to the trial court to determine whether intervening events have truly mooted the claims of the putative class.<sup>162</sup> If the trial court concludes that there likely exists a constant class of persons suffering the same deprivations, then it should not find that this class action is moot. Indeed, the case is moot only if the new policies in fact remedy each and every one of the putative class's constitutional claims—if even one issue remains live between defendants and the putative class, the suit as a whole

is not moot.<sup>163</sup> Because the facts pleaded here are sufficient to establish that a continuing class likely used to exist, and because defendants now argue that intervening events have mooted the class's claims, the burden is on defendants to establish this—cursory, blanket statements to this effect will not be enough.

Absent such a showing, the suit is not moot: A class of individuals, consisting of criminal defendants who share many or all of these claims with the named plaintiffs, would still likely exist and would still have a live, justiciable controversy with defendants.<sup>164</sup> The trial court should then proceed to the question of certification, which will “relate back” to the moment when the named plaintiffs first filed the suit—a time when there still existed alive dispute with \*168 defendants.<sup>165</sup> Thanks to the relation-back doctrine, the named plaintiffs—that is, those with standing—will still have standing to litigate the certification question, even though their individual claims are moot.<sup>166</sup>

## VI. Conclusion

The court of appeals erred in concluding that a named plaintiff must have standing on each of the class's claims in order to seek class certification. Thus, the court erred in vacating the trial court's denial of defendants' plea the jurisdiction and in dismissing this case for want of subject-matter jurisdiction. At least one named plaintiff had standing to bring at least one of the class's claims. Finally, the court of appeals erred in concluding that the claims of the putative class are now all moot.

## Footnotes

- 1 The Honorable John Christian Doerfler, who has been substituted as a defendant in this case by the Honorable Dan A. Gattis, his successor in office. See Tex.R.App. P. 7.2(a).
- 2 The Honorable Judges Suzanne Brooks, Tim Wright, and Donald Higginbotham (substituted as a defendant here by the Honorable Doug Arnold, his successor in office).
- 3 The Honorable William Eastes.
- 4 The Honorable Bob Jones, who was visiting from Travis County and who is not a party to this lawsuit.
- 5 See Tex. Civ. Prac. & Rem.Code § 51.014(a)(8); *Harris Cnty. v. Sykes*, 136 S.W.3d 635, 638–39 (Tex.2004).
- 6 368 S.W.3d 1, 16–.
- 7 54 Tex.Sup.Ct.J. 1012 (May 27, 2011).
- 8 See Tex. Gov't Code § 22.225(b).
- 9 See *id.* § 22.225(c).
- 10 368 S.W.3d at 16.
- 11 *E.g., Williams v. Lara*, 52 S.W.3d 171, 184–85 (Tex.2001); see *Thomas v. Long*, 207 S.W.3d 334, 338 (Tex.2006).

On remand, the trial court should determine whether “intervening events” have resolved (and thereby mooted) the constitutional claims of the class, or if instead the class maintains a live dispute with defendants. If the trial court finds the latter to be the case, it should determine which of the other named plaintiffs (if any) had standing to bring which of the putative class's claims.

Given the procedural posture of this case, we cannot at this time adjudicate the merits of plaintiffs' complaint. We note, however, the gravity of their allegations: The U.S. Supreme Court has described the right to counsel as “indispensable to the fair administration of our adversary system of criminal justice.”<sup>167</sup> In the words of one learned commentator, “[t]here is no more important protection provided by the Constitution to an accused than the right to counsel.”<sup>168</sup> Like all participants in our judicial system, and indeed all members of our society, we take seriously an allegation that any person or entity is systematically depriving others of such a fundamental right.

That said, our decision today is limited to jurisdictional issues. Because the court of appeals erred in dismissing this suit for want of subject matter jurisdiction, we reverse its decision and remand to the trial court for further proceedings consistent with this opinion.

## All Citations

369 S.W.3d 137, 55 Tex. Sup. Ct. J. 803

12     *In re Allcat Claims Serv., L.P.*, 356 S.W.3d 455, 459–60 (Tex.2011).

13     Tex. Const. art. V, § 3(a) (“[The Court’s] jurisdiction shall be co-extensive with the limits of the State and its determinations shall be final except *in criminal law matters*. Its appellate jurisdiction shall be final and shall extend to all cases except *in criminal law matters*.” (emphasis added)).

14     *Harrell v. State*, 286 S.W.3d 315, 317 (Tex.2009). However, we necessarily have jurisdiction to decide whether this appeal falls within the category of “criminal law matters,” because “[c]ourts always have jurisdiction to determine their own jurisdiction.” *Id.*; see *Campbell v. State*, 85 S.W.3d 176, 180 (Tex.2002).

15     See *Harrell*, 286 S.W.3d at 318–19.

16     *Id.* at 318.

17     *Id.*

18     See, e.g., *id.* (citing opinions from the Court of Criminal Appeals for the definition of “criminal law matters”).

19     Tex. Const. art. V, § 5(c).

20     See *In re Johnson*, 280 S.W.3d 866, 872–73 (Tex.Crim.App.2008).

21     See *id.*; *State ex rel. Holmes v. Third Court of Appeals*, 885 S.W.2d 389, 410–11 (Tex.Crim.App.1994) (Clinton, J., dissenting) (arguing that “criminal law matters,” as that term is used in Article V, Section 3(a), and Article V, Section 5(c), should be interpreted in the same way to avoid jurisdictional conflicts); see also *Dearing v. Wright*, 653 S.W.2d 288, 289–90 (Tex.1983) (noting that “[u]nder our dual appellate system, we must concede to those courts the exclusive jurisdictional prerogative in criminal law matters our constitution requires that they exercise”).

22     See Tex. Const. art. II, § 1.

23     See *id.* art. I, § 13.

24     *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443–45 (Tex.1993) (explaining basis for standing under Texas Constitution); see *Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.*, 971 S.W.2d 439, 442–43 (Tex.1998) (same).

25     See *Harrell*, 286 S.W.3d at 318 (holding that a case involving the interpretation of section 501.014 of the Texas Government Code was not a “criminal law matter” because it presented the issue of how to interpret and enforce a civil statute); *In re Johnson*, 280 S.W.3d at 869–74 (same); see also *Smith v. Flack*, 728 S.W.2d 784, 788–89 (Tex.Crim.App.1987) (holding a case, involving interpretation of article 26.05 of the Code of Criminal Procedure, was a “criminal law matter”); *Curry v. Wilson*, 853 S.W.2d 40, 43 (Tex.Crim.App.1993) (same).

26     See *Harrell*, 286 S.W.3d at 319.

27     See *id.* at 318.

28     *Tex. Ass’n of Bus.*, 852 S.W.2d at 444.

29     See *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex.2001).

30     See, e.g., *Williams v. Lara*, 52 S.W.3d 171, 178 (Tex.2001) (noting that the justiciability doctrine of standing “is a constitutional prerequisite to maintaining suit”).

31     See, e.g., *Bd. of Adjustment v. Wende*, 92 S.W.3d 424, 427 (Tex.2002) (“It is well settled that a controversy must exist between the parties at every stage of the legal proceedings, including the appeal.”).

32     The Court of Criminal Appeals has recognized as much: “In Texas, the law of standing has been developed mainly in the courts of civil jurisdiction.” *Fuller v. State*, 829 S.W.2d 191, 201 (Tex.Crim.App.1992), abrogated on other grounds by *Riley v. State*, 889 S.W.2d 290, 301 (Tex.Crim.App.1993).

33     See, e.g., *State ex rel. Watkins v. Creuzot*, 352 S.W.3d 493, 504–06 (Tex.Crim.App.2011) (considering ripeness of criminal defendant’s pretrial declaratory judgment claim that the State could not execute him); *Ex parte Bohannan*, 350 S.W.3d 116, 119–20 (Tex.Crim.App.2011) (analyzing justiciability of parolee’s habeas claims); *Gallo v. State*, 239 S.W.3d 757, 780 (Tex.Crim.App.2007) (assessing justiciability of habeas challenge to the manner of an impending execution); *Ex parte Nelson*, 815 S.W.2d 737, 738–39 (Tex.Crim.App.1991) (per curiam) (determining applicability of an exception to mootness).

34     See *Harrell*, 286 S.W.3d at 319 (identifying the “chief features of a criminal proceeding”).

35     See *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 202, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008).

36     See Tex.R. Civ. P. 42 (stating rules for suing as a class).

37     See 43B George B. Dix & John M. Schmolesky, Texas Practice Series: Criminal Practice and Procedure §§ 61:6–8 (3d ed.2011) (citing cases); 27 Tex. Jur.3d *Criminal Procedure: Post-trial Proceedings* § 598 (2010) (same).

38     *Comm’rs’ Court v. Beall*, 98 Tex. 104, 81 S.W. 526, 528 (1904); see also *Harrell*, 286 S.W.3d at 319 (concluding that case was “more civil than criminal”).

39 See, e.g., *Armstrong v. State*, 340 S.W.3d 759, 765 (Tex.Crim.App.2011) (“An issue does not cease to be a criminal law matter merely because elements of civil law must be addressed to resolve the issue.”); *Lanford v. Fourteenth Court of Appeals*, 847 S.W.2d 581, 585 n. 3 (Tex.Crim.App.1993) (“In making th[e] determination [of what constitutes a ‘criminal law matter’], we are not bound by the fact that there may be civil law facets to the issue at hand, anymore than the Texas Supreme Court, in determining whether a matter is civil in nature, is bound by the fact that the matter may be quasi-criminal.”); see also *In re Johnson*, 280 S.W.3d at 870 (“[R]esolution of the question presented by this mandamus application requires us to scrutinize no criminal-law statute. So, the question arises: Is this a ‘criminal law matter’ that requires us, incidentally, to examine certain provisions of the civil law for resolution, or is it primarily a civil law matter that happens, incidentally, to emanate from a judgment in a criminal case, but is not otherwise related to criminal law at all?”).

40 See *State v. Morales*, 869 S.W.2d 941, 946–48 (Tex.1994).

41 *Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 553–54 (Tex.2000).

42 *Tex. Dep’t of Transp. v. City of Sunset Valley*, 146 S.W.3d 637, 646 (Tex.2004) (standing); *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 928 (Tex.1998) (ripeness); see *Speer v. Presbyterian Children’s Home & Serv. Agency*, 847 S.W.2d 227, 229 (Tex.1993) (mootness).

43 *Tex. Dep’t of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex.2004).

44 See *id.*

45 *Bland Indep. Sch. Dist.*, 34 S.W.3d at 555.

46 *Miranda*, 133 S.W.3d at 226.

47 *Id.* at 227.

48 See *id.* at 226.

49 See *Sw. Bell Tel. Co. v. Mktg. on Hold Inc.*, 308 S.W.3d 909, 915 (Tex.2010).

50 *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304 (Tex.2008).

51 See *Andrade v. NAACP of Austin*, 345 S.W.3d 1, 14 (Tex.2011) (“[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought.” (quoting *Davis v. Fed. Election Comm’n*, 554 U.S. 724, 734, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008))).

52 See *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 392 (Tex.2000) (holding that plaintiff had standing on some claims but not others, and dismissing only those claims for which it lacked standing).

53 *Sw. Bell Tel. Co.*, 308 S.W.3d at 915.

54 *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 710 (Tex.2001).

55 *Id.*

56 *Id.* at 711.

57 368 S.W.3d at 16.

58 See *id.* at 16. For this reason, the court held that the named plaintiffs “lack standing to litigate whether that class should be certified.” See *id.*

59 See, e.g., *Bowden v. Phillips Petroleum Co.*, 247 S.W.3d 690, 698–709 (Tex.2008).

60 “Because standing is a constitutional prerequisite to maintaining a suit under both federal and Texas law, we look to the more extensive jurisprudential experience of the federal courts on this subject for any guidance it may yield.” *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex.1993); see *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex.2001).

61 Defendants cite *Griffin v. Dugger*, 823 F.2d 1476, 1482 (11th Cir.1987), but neglect to point out language particularly troubling for their position. There, the Eleventh Circuit stated that “each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim.” *Id.* at 1483. The court quoted this rule in *Prado–Steiman v. Bush*, 221 F.3d 1266, 1279–80 (11th Cir.2000), another case defendants cite. There, the court concluded that the named plaintiffs did not have standing to bring all of the class’s legal claims. *Id.* at 1283. Rather than dismissing the entire suit on standing grounds, however, the court remanded for a reassessment of which plaintiffs satisfied the typicality requirement. *Id.*

In *James v. City of Dallas*, another case defendants cite, the Fifth Circuit stated that “at least one named Plaintiff must have standing to seek injunctive relief on each of the claims against [the defendants].” 254 F.3d 551, 563 (5th Cir.2001). However, the court could not possibly have meant that at least one plaintiff must have standing on each and every claim: It held that the two named plaintiffs had standing to bring some claims but not others, and so dismissed just those claims for which both the plaintiffs lacked standing. *Id.* at 573.

The single case defendants point to which appears to support their position is *Grant v. Gilbert*, 324 F.3d 383, 389–90 (5th Cir.2003). However, we are unpersuaded by this lone case, especially in light of the authority going the other way.

62 See 1 William B. Rubenstein, *Newberg On Class Actions* § 2:5, at 72–73 (5th ed.2011).

63 *Id.* § 2:1, at 59 (“[O]n the one hand, the presence of individual standing to raise issues generally, whether or not common to a class, is required from a constitutional perspective. On the other hand, the meeting of such individual standing tests does not automatically entitle the plaintiff to maintain a class action—she must independently satisfy the additional class representation requirements.”); see also 7AA Charles Alan Wright et al., *Federal Practice & Procedure* § 1785. 1, at 388–89 (3d ed. 2005) (“Representative parties who have a direct and substantial interest have standing; the question whether they may be allowed to present claims on behalf of others who have similar, but not identical, interests depends not on standing, but on an assessment of typicality and adequacy of representation.”).

64 An exception to this rule applies where there are multiple plaintiffs in a case, who seek injunctive or declaratory relief (or both), who sue individually, and who all seek the same relief. There, the court need not analyze the standing of more than one plaintiff—so long as that plaintiff has standing to pursue as much or more relief than any of the other plaintiffs. The reason behind this exception is that, if that plaintiff prevails on the merits, the same prospective relief would issue regardless of the standing of the other plaintiffs. See, e.g., *Andrade*, 345 S.W.3d at 6–7.

65 See, e.g., *Am. Motorists Ins. Co. v. Fodge*, 63 S.W.3d 801, 805 (Tex.2001) (noting that “[i]f a claim is not within a court's jurisdiction ... then it must be dismissed,” and concluding that while the trial court erred by dismissing all of the plaintiff's claims for lack of jurisdiction, the court of appeals also erred by reinstating them all).

66 *Id.*; see *Thomas v. Long*, 207 S.W.3d 334, 338 (Tex.2006) (“[I]t is proper for a trial court to dismiss claims over which it does not have subject matter jurisdiction but retain claims in the same case over which it has jurisdiction.”); *Williams v. Lara*, 52 S.W.3d 171, 185 (Tex.2001) (dismissing some claims for some parties, some claims for others, and one claim entirely since no one had standing to bring that claim).

67 See *S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307–08 (Tex.2007) (per curiam).

68 *Blum v. Yaretsky*, 457 U.S. 991, 999, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982).

69 *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n. 20, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976).

70 *Warth v. Seldin*, 422 U.S. 490, 502, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 708 (Tex.2001).

71 *Lewis v. Casey*, 518 U.S. 343, 358 n. 6, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (quoting *Blum*, 457 U.S. at 999, 102 S.Ct. 2777).

72 See *James*, 254 F.3d at 563–69 (noting that “standing ... must be addressed on a claim-by-claim basis,” concluding that the class representatives had standing to bring some claims but not others, and therefore dismissing only some claims); see also *Pagan v. Calderon*, 448 F.3d 16, 27–30 (1st Cir.2006) (analyzing standing “plaintiff by plaintiff and claim by claim”).

73 See *M.D. Anderson Cancer Ctr.*, 52 S.W.3d at 710.

74 *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 307 (Tex.2008).

75 See *id.* at 304, 307.

76 *Id.*; see *Neeley v. W. Orange–Cove Consol. Indep. Sch. Dist.*, 176 S.W.3d 746, 774 (Tex.2005) (“[S]tanding limits ... jurisdiction to cases involving a distinct injury to the plaintiff and a real controversy between the parties, which ... will be actually resolved by the judicial declaration sought.” (internal quotation marks omitted)); *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex.2001) (same).

77 *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984); see also *Todd*, 53 S.W.3d at 305 (repeating this test).

78 *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (citations omitted).

79 *Lomas*, 223 S.W.3d at 307 (“[A]s a general rule, to have standing an individual must demonstrate a particularized interest in a conflict distinct from that sustained by the public at large.”).

80 *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex.1993); see Tex. Const. art. I, § 13 (Open Courts provision).

81 *Inman*, 252 S.W.3d at 304–05 (citations omitted).

82 See, e.g., *Neeley*, 176 S.W.3d at 774.

83 *Allen*, 468 U.S. at 751, 104 S.Ct. 3315.

84 *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976).

85 See, e.g., *Austin Nursing Ctr., Inc. v. Lovato*, 171 S.W.3d 845, 850 (Tex.2005).

86 13A Charles Alan Wright et al., *Federal Practice & Procedure* § 3531.5, at 385 (3d ed.2008).

87 *Allen*, 468 U.S. at 751, 104 S.Ct. 3315.

- 88     *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000).
- 89     See, e.g., *Wilson v. Andrews*, 10 S.W.3d 663, 669 (Tex.1999).
- 90     See *Williams v. Lara*, 52 S.W.3d 171, 184–85 (Tex.2001).
- 91     *Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 771, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000). Note that, under federal law, the plaintiff need not show that a favorable decision will relieve every single one of the plaintiff's alleged injuries—the plaintiff simply must show that "a favorable decision will relieve a discrete injury to himself." *Larson v. Valente*, 456 U.S. 228, 243 n. 15, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982).
- 92     *Allen*, 468 U.S. at 752, 104 S.Ct. 3315.
- 93     See *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 710–11 (Tex.2001); see also *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008) ("[T]he standing inquiry ... focuse[s] on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed.").
- 94     U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence."). The Sixth Amendment right to counsel applies to the states via the Due Process Clause of the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 339–45, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).
- 95     Tex. Const. art. I, § 10 ("In all criminal prosecutions the accused ... shall have the right of being heard by ... counsel....").
- 96     *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 202, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008).
- 97     See 42 U.S.C. § 1983.
- 98     At the "first appearance," the court fixes the identity of the accused and hears his plea. See Tex.Code Crim. Proc. art. 26.02.
- 99     See *M.D. Anderson Cancer Ctr.*, 52 S.W.3d at 710. In Section V, *infra*, we consider whether these subsequent events (and others) may have mooted plaintiffs' claims.
- 100    See *S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307 (Tex.2007) (per curiam).
- 101    See *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304–05 (Tex.2008).
- 102    See Act of June 14, 2001, 77th Leg., R.S., ch. 906, 2001 Tex. Gen. Laws 1800; see also Tex. Gov't Code §§ 71.061(a), .062.
- 103    See *Allen*, 468 U.S. at 751, 104 S.Ct. 3315.
- 104    See *Inman*, 252 S.W.3d at 304 ("[A] plaintiff does not lack standing simply because he cannot prevail on the merits of his claim.").
- 105    To that end, we note that the U.S. Supreme Court recently considered the merits of a section 1983 claim against another Texas county for violating a criminal defendant's constitutional right to counsel. See generally *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008). While the Court did not expressly consider the question of standing, it considered the merits of the question there: whether the right to counsel attaches at the "magistration" proceeding. See *id.*
- 106    That judge, the Honorable Bob Jones of Travis County, is not a party to this suit.
- 107    *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71, 71 n. 10, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989).
- 108    *Allen*, 468 U.S. at 751, 104 S.Ct. 3315.
- 109    The relevant portion of plaintiffs' request for declaratory relief is as follows:  
      (C) that Defendants' practice of denying counsel to persons accused of crime for which a punishment of imprisonment is possible and who are able to post bond, or whose family members and friends post bond on their behalf, when such persons are not financially able to hire a lawyer violates the United States Constitution, the Texas Constitution, and the Texas Code of Criminal Procedure....
- 110    The relevant portion of plaintiffs' request for injunctive relief is as follows:  
      (C) Defendants fairly evaluate the requests for appointment of counsel made by all persons accused of an offense for which a punishment of imprisonment is possible in Williamson County, following the guidelines and standards contained in Texas law and local rule, without reference to whether the accused person's family and/or friends are able to post bond or to whether the accused person is physically unable to work....
- 111    *Faretta v. California*, 422 U.S. 806, 818–19, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975); see U.S. Const. amend. VI.
- 112    Tex. Const. art. I, § 10 ("In all criminal prosecutions the accused ... shall have the right of being heard by himself....").
- 113    See *Faretta*, 422 U.S. at 835, 95 S.Ct. 2525.
- 114    See *Miranda v. Arizona*, 384 U.S. 436, 473, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); 3B Charles Alan Wright et al., *Federal Practice and Procedure* § 733, at 70–71 (3d ed.2004).
- 115    Heckman requests other injunctive and declaratory relief that may also have relieved his alleged injury.

- 116 See 368 S.W.3d at 15.
- 117 U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial...."). This right applies to the states. *Presley v. Georgia*, 558 U.S. 209, 130 S.Ct. 721, 723, 175 L.Ed.2d 675 (2010).
- 118 See Tex. Const. art. I, § 13 ("All courts shall be open....").
- 119 For example, plaintiffs allege that when criminal defendants appear before the Williamson County magistrate, "[t]hese proceedings are held in a secure area within the jail and are not open to family members or members of the public." Plaintiffs allege similar facts about the first appearance docket: "A bailiff is standing at the door to the courtroom and tells people attempting to enter the courtroom that only persons with cases on the docket are allowed in the courtroom.... Bailiffs stationed inside the courtroom also repeatedly ask whether there are any family members or members of the public inside the courtroom, and order any person who does not have a case on the first appearance docket to leave the courtroom."
- 120 *Williams v. Lara*, 52 S.W.3d 171, 184–85 (Tex.2001).
- 121 *E.g., S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 307 (Tex.2007) (per curiam).
- 122 We note that at least one named plaintiff appears to have demonstrated standing on this claim. At the time Jessica Stempko joined this suit, her daughter Kelsey stood accused of a misdemeanor offense. Her daughter had already appeared before a magistrate and was anticipating an imminent "first appearance." Jessica Stempko wanted to attend. But at the time she joined this suit, Williamson County had a published policy of preventing any non-defendants from attending a first appearance. The record includes a printout from the county attorney's website announcing the following: "Due to the limited only [sic] space, only the defendant is allowed in the courtroom for the first appearance setting. (No children, spouses, parents, or friends.)" In light of Williamson County's stated and published rule, Jessica Stempko alleged that she likely would be denied access to her daughter's first appearance. And the right to a public trial belongs to members of the public just as it does to the accused. *Presley*, 130 S.Ct. at 723. Thus, Jessica Stempko has pleaded facts sufficient, for standing purposes, to establish that she faced an imminent deprivation of her constitutional right to open-court proceedings. See *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008) ("[T]he injury required for standing need not be actualized. A party facing prospective injury has standing to sue where the threatened injury is real, immediate, and direct."); *Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.*, 971 S.W.2d 439, 442 (Tex.1998). Further, it seems reasonable to assume that this alleged injury is "fairly traceable" to Williamson County. And it seems that redressability is satisfied, too: Plaintiffs requested injunctive and declaratory relief that would require "defendants [to] allow members of the public access to court proceedings, including magistration and first appearance proceedings" and would declare that defendants' policy of doing otherwise "violates the United States Constitution and the Texas Constitution."
- 123 See *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 711 (Tex.2001).
- 124 368 S.W.3d at 16.
- 125 See *M.D. Anderson Cancer Ctr.*, 52 S.W.3d at 708–09.
- 126 *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 443–45 (Tex.1993).
- 127 *Nat'l Collegiate Athletic Ass'n v. Jones*, 1 S.W.3d 83, 86 (Tex.1999).
- 128 *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex.2001).
- 129 *VE Corp. v. Ernst & Young*, 860 S.W.2d 83, 84 (Tex.1993) (per curiam).
- 130 See *Speer v. Presbyterian Children's Home & Serv. Agency*, 847 S.W.2d 227, 229–30 (Tex.1993).
- 131 See *Williams*, 52 S.W.3d at 184.
- 132 See *id.*; *Speer*, 847 S.W.2d at 228.
- 133 13C Charles Alan Wright et al., *Federal Practice & Procedure* § 3533.9.1, at 523 (3d ed.2008).
- 134 See *Tex. Ass'n of Bus.*, 852 S.W.2d at 444.
- 135 In the latter category of cases, the class action as a whole will generally not become moot, even if the named plaintiff's individual claims do. See *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 404, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980); *Sosna v. Iowa*, 419 U.S. 393, 399–402, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975); Erwin Chemerinsky, *Federal Jurisdiction* § 2.5.5, at 144–47 (5th ed.2007). But the Supreme Court has explicitly declined to extend this automatic "class action exception" to the former category of cases. See 1 William B. Rubenstein, *Newberg on Class Actions* § 2:11, at 110 (5th ed.2011). Most federal appellate courts have done the same. See *id.* § 2:11, at 111 n. 9 (citing cases from nearly every federal court of appeals). The result is a very bright line rule: If the named plaintiff's individual claims become moot after the trial court rules on certification,

the suit will usually survive automatically, while if this happens *before*, the suit can survive only if another exception to mootness applies.

Here, the named plaintiffs' claims became moot before the trial court had time to decide whether to certify the class. Given the weight of federal authority, we decline to apply the automatic "class action exception" to mootness beyond the bounds of the Supreme Court's own caselaw. Therefore, if this class action is to survive the mooting of the named plaintiffs' individual claims, it must do so under another exception.

136 See, e.g., *Geraghty*, 445 U.S. at 398–400, 100 S.Ct. 1202; *Clark v. State Farm Mut. Auto. Ins. Co.*, 590 F.3d 1134, 1139 (10th Cir.2009) (noting several such exceptions).

137 *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44, 52, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991).

138 See *Gerstein v. Pugh*, 420 U.S. 103, 110 n. 11, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975).

139 1 William B. Rubenstein, *Newberg on Class Actions* § 2:13, at 122 (5th ed.2011). An example of an inherently transitory claim is a challenge to the length of time an arrestee must wait in jail before receiving a judicial determination of probable cause as required by the Fourth Amendment. See *McLaughlin*, 500 U.S. at 51–52, 111 S.Ct. 1661. If the only relief sought is injunctive and declaratory, the named plaintiff's individual claims may very well become moot as soon as he receives his probable cause hearing. But notwithstanding the mooting of the named plaintiff's individual claims, there may continue to exist a body of people out there who still have the same claims and suffer the same injuries that the named plaintiff once did—arrestees stuck in jail for an unconstitutionally long time awaiting what should have been a prompt probable cause determination. Individual claimants move in and out of that class with the passage of time, but a body of such claimants continues to exist so long as the alleged harm persists.

140 See *Geraghty*, 445 U.S. at 398–400, 100 S.Ct. 1202.

141 *Olson v. Brown*, 594 F.3d 577, 582–84 (7th Cir.2010).

142 13C Charles Alan Wright Et Al., *Federal Practice & Procedure* § 3533.9.1, at 521 (3d ed.2008); see *M.D. Anderson Cancer Ctr.*, 52 S.W.3d at 711.

143 See, e.g., *Geraghty*, 445 U.S. at 398–99, 100 S.Ct. 1202; *Clark*, 590 F.3d at 1139.

144 See *Tex. A & M Univ.-Kingsville v. Yarbrough*, 347 S.W.3d 289, 290–91 (Tex.2011).

145 See *id.*

146 See *Geraghty*, 445 U.S. at 398–99, 100 S.Ct. 1202; *Williams v. Lara*, 52 S.W.3d 171, 184 (Tex.2001).

147 *McLaughlin*, 500 U.S. at 52, 111 S.Ct. 1661; *Swisher v. Brady*, 438 U.S. 204, 213 n. 11, 98 S.Ct. 2699, 57 L.Ed.2d 705 (1978).

148 *Olson*, 594 F.3d at 582; see *Swisher*, 438 U.S. at 213 n. 11, 98 S.Ct. 2699; *Gerstein*, 420 U.S. at 110 n. 11, 95 S.Ct. 854; *Sze v. I.N.S.*, 153 F.3d 1005, 1010 (9th Cir.1998); *Zurak v. Regan*, 550 F.2d 86, 91–92 (2d Cir.1977).

149 *Williams*, 52 S.W.3d at 184.

150 *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 563, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980)).

151 The record includes data that illustrates just how short-lived a Texas misdemeanor case can be. In the trial court, plaintiffs cited studies from Hidalgo and Bexar Counties indicating that, for misdemeanor defendants who (like these plaintiffs) faced possible jail time, *even after they were appointed counsel* the average time from arrest to first appearance was about a month, and the average time from first appearance to final disposition was about another month. And, of course, magistration itself must generally occur within 24 hours of arrest. See Tex.Code Crim. Proc. art. 15.17(a). Plaintiffs further allege that the defendant county court at law judges have the practice of pressuring misdemeanor defendants to plead out at their first appearance. If true, this practice would further shorten the amount of time those cases remain "live"—meaning even less time to challenge the unconstitutional deprivation of their pretrial rights.

152 *Williams*, 52 S.W.3d at 184.

153 *McLaughlin*, 500 U.S. at 51–52, 111 S.Ct. 1661; *Gerstein*, 420 U.S. at 110 n. 11, 95 S.Ct. 854.

154 See *Geraghty*, 445 U.S. at 399, 100 S.Ct. 1202.

155 See *McLaughlin*, 500 U.S. at 52, 111 S.Ct. 1661 (quoting *Geraghty*, 445 U.S. at 399, 100 S.Ct. 1202).

156 See, e.g., *Olson*, 594 F.3d at 583–84.

157 The County's revised policy is not part of the record from the trial court, as defendants adopted it some time after filing their interlocutory appeal. They did, however attach a copy to one of their supplemental briefs to the court of appeals.

158 See Act of June 16, 2007, 80th Leg., R.S., ch. 463, 2007 Tex. Gen. Laws 821.

159 See *Rothgery v. Gillespie Cnty.*, 554 U.S. 191, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008); *Davis v. Tarrant Cnty.*, 565 F.3d 214 (5th Cir.2009).

- 160 See, e.g., *Williams*, 52 S.W.3d at 184; *City of Garland v. Louton*, 691 S.W.2d 603, 604 (Tex.1985) (per curiam).
- 161 See, e.g., *Trulock v. City of Duncanville*, 277 S.W.3d 920, 925–27 (Tex.App.-Dallas 2009, no pet.); see generally Erwin Chemerinsky, *Federal Jurisdiction* § 2.5.4, at 141–43 (5th ed.2007).
- 162 See 13C Charles Alan Wright Et Al., *Federal Practice & Procedure* § 3533.7, at 365–66 (3d ed.2008); see also *United States v. Brandau*, 578 F.3d 1064, 1067–70 (9th Cir.2009) (remanding case for further proceedings to determine whether subsequent events had truly mooted plaintiff's claims).
- 163 See *Camarena v. Tex. Emp't Comm'n*, 754 S.W.2d 149, 151 (Tex.1988).
- 164 See *Williams*, 52 S.W.3d at 184.
- 165 See *Geraghty*, 445 U.S. at 398–400, 100 S.Ct. 1202.
- 166 *Olson*, 594 F.3d at 582–84.
- 167 *Brewer v. Williams*, 430 U.S. 387, 398, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); see also *Powell v. Alabama*, 287 U.S. 45, 57, 68–69, 53 S.Ct. 55, 77 L.Ed. 158 (1932) (describing the importance of the right).
- 168 3B Charles Alan Wright et al., *Federal Practice & Procedure* § 731, at 55 (3d ed.2004).

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SEE TX R RAP RULE 47.2 FOR  
DESIGNATION AND SIGNING OF OPINIONS.

Court of Appeals of Texas, Austin.

TEXAS DEPARTMENT OF FAMILY  
AND PROTECTIVE SERVICES; Henry  
Whitman, in His Official Capacity as  
DFPS Commissioner; Texas Health  
and Human Services Commission;  
Charles Smith, in His Official Capacity  
as HHSC Executive Commissioner;  
Corrections Corporation of America;  
and the GEO Group, Inc., Appellants

v.

GRASSROOTS LEADERSHIP, INC.;  
Gloria Valenzuela; E.G.S., for Herself and  
as Next Friend for A.E.S.G.; F.D.G., for  
Herself and as Next Friend for N.R.C.D.;  
Y.E.M.A., for Herself and as Next Friend  
for A.S.A.; Y.R.F., for Herself and as  
Next Friend for C.R.R.; S.J.M.G., for  
Herself and as Next Friend for J.C.M.;  
K.G.R.M., for Herself and as Next Friend  
for A.V.R.; C.R.P., for Herself and as  
Next Friend for A.N.C.P.; B.E.F.R., for  
Herself and as Next Friend for N.S.V.;  
S.E.G.E., for Herself and as Next Friend  
for G.E.A.; Leser Julieta Lopez Herrera,  
for Herself and as Next Friend for A.B.;  
and Rose Guzman de Marquez, for Herself  
and as Next Friend for D.R., Appellees

NO. 03-18-00261-CV

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Filed: November 28, 2018

**FROM THE DISTRICT COURT OF TRAVIS COUNTY,  
353RD JUDICIAL DISTRICT, NO. D-1-GN-15-004336,  
HONORABLE KARIN CRUMP, JUDGE PRESIDING**

**Attorneys and Law Firms**

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Ms. Amy Warr, Mr. Nicholas Bacarisse, Alexander Dubose Jefferson & Townsend LLP, 515 Congress Ave., Ste. 2350, Austin, TX, 78701, for appellee.

Before Justices Puryear, Goodwin, and Bourland

**MEMORANDUM OPINION**

David Puryear, Justice

\*1 This appeal concerns several parties' challenges to the validity of a rule promulgated by the Texas Department of Family and Protective Services (DFPS). The challenged rule requires "family residential centers" (FRCs)—which serve as detention centers for immigrants and their minor children who are subject to federal civil-immigration proceedings—to be licensed as "general residential operations" (GROs) and, thus, subject to the State's minimum standards for such facilities.<sup>1</sup> As they did below in a plea to the jurisdiction, appellants DFPS and its Commissioner and the Texas Health and Human Services Commission (HHSC) and its Executive Commissioner contend that the trial court should not have reached the merits of the rule challenge because each plaintiff below lacked standing to confer jurisdiction on the trial court. We agree with appellants and, for the following reasons, reverse the trial court's judgment and render judgment granting appellants' plea to the jurisdiction and dismissing appellees' rule-challenge claims with prejudice.

**BACKGROUND<sup>2</sup>**

In 1985 a class of plaintiffs initiated a lawsuit against U.S. Immigration and Customs Enforcement (ICE) and other defendants in the District Court of Central California; many years later, the parties entered into a court-approved settlement of the lawsuit (the “*Flores Settlement Agreement*”). *See Flores v. Lynch*, 828 F.3d 898, 901–03 (9th Cir. 2016). The *Flores Settlement Agreement* “set[ ] out nationwide policy for the detention, release, and treatment of minors in the custody of [ICE].” *Id.* at 901. Under the *Flores Settlement Agreement*, unless detention is necessary to secure a minor’s appearance in court or to ensure safety, ICE must promptly release the minor to an adult family member or other suitable individual or entity. *Id.* at 902–03. Also, ICE must temporarily place all unreleased minors in an unsecure and “licensed program”—i.e., a facility that is “licensed by an appropriate State agency to provide residential, group, or foster care services for dependent children.” *Id.* at 903.

\*2 In response to increased numbers of Central Americans arriving at the U.S.-Mexico border during the summer of 2014, and to deter further arrivals, ICE adopted a policy of detaining all female-headed immigrant families. *Flores v. Johnson*, 212 F. Supp. 3d 864, 869 (C.D. Cal. 2015), *aff’d in part, rev’d in part and remanded sub nom. Flores v. Lynch*, 828 F.3d 898 (9th Cir. 2016). Detention under ICE’s new policy would last for the duration of the deportation proceedings that determine if the mothers and children are entitled to remain in the United States. *Id.* Notwithstanding the *Flores Settlement Agreement*, ICE’s new policy provided that the immigrants would be detained in secure, unlicensed facilities. *Id.* In federal court, the new ICE policy was held to violate the *Flores Settlement Agreement*. *See id.* at 879 (“Defendants cannot be in substantial compliance with the Agreement because the facilities are secure and non-licensed.”), *aff’d in relevant part*, 828 F.3d at 908–10.

ICE opened three new family detention facilities, two in south Texas—known as “Dilley” and “Karnes” due to their locations—and one in New Mexico, which was closed shortly thereafter. *Flores*, 828 F.3d at 904. This lawsuit concerns the Dilley and Karnes facilities, which are operated by private prison companies under contract with ICE. Appellant Corrections Corporation of America (currently known as CoreCivic) operates the Dilley facility; appellant GEO Group, Inc., operates the Karnes facility. The Karnes and Dilley facilities began detaining immigrant women and children in 2014.

DFPS did not attempt to regulate FRCs in Texas until it adopted an emergency rule on September 2, 2015. Before that time, DFPS had historically and consistently acknowledged that it lacked authority to license FRCs and declined to do so based upon that lack of authority. Shortly after the emergency rule was adopted, Grassroots Leadership initiated this lawsuit to challenge the emergency rule. The trial court issued a temporary injunction prohibiting DFPS from implementing the emergency rule but expressly permitting it to proceed through the traditional rulemaking procedures outlined in the Texas Government Code. *See Tex. Gov’t Code §§ 2001.023–029*. DFPS followed the procedures for rulemaking and subsequently adopted Rule 748.7 (referred to by the parties and in the trial court’s judgment as the “FRC Rule”). *See 26 Tex. Admin. Code § 748.7 (2018) (Health & Human Servs. Comm’n, How are these regulations applied to family residential centers?)* (formerly codified at 40 Tex. Admin. Code § 748.7).

Grassroots Leadership amended its petition several times while the cause was pending below, adding additional plaintiffs: Gloria Valenzuela, who operates a day-care facility in El Paso, and several detainees, on behalf of themselves and their minor children. CoreCivic and GEO Group intervened as defendants. Appellees’ live petition asserts the following causes of action against appellants: (1) a challenge to the FRC Rule as allegedly exceeding DFPS’s statutory authority in contravention of the Human Resources Code, *see Tex. Gov’t Code § 2001.038*; (2) a request for declaratory relief under the Uniform Declaratory Judgments Act (UDJA), *see Tex. Civ. Prac. & Rem. Code §§ 37.001–011*; and (3) a claim that DFPS’s attempts to issue licenses to Karnes and Dilley constitute ultra vires acts.<sup>3</sup>

\*3 Appellees’ live petition outlines their primary contentions for challenging the validity of the FRC Rule: the rule exceeds DFPS’s statutory authority; DFPS did not provide a reasoned justification, *see Tex. Gov’t Code 2001.033(a)(1)*; the rule’s provisions prolong the detention of minors; the rule allows for the detention of minors in violation of Family Code section 54.011(f), *see Tex. Fam. Code § 54.011(f)* (“[A] nonoffender, including a person who has been taken into custody and is being held solely for deportation out of the United States, may not be detained for any period of time in a secure detention facility ....”); and the rule “authoriz[es] conditions of detention for mothers and children ... by permitting exceptions to minimum child safety standards established by DFPS itself ... that increase their risk of physical harm and fear for their physical safety.” Plaintiffs below sought a

declaration invalidating the rule and declaring that DFPS has no authority to issue licenses to Dilley and Karnes.

Appellants filed pleas to the jurisdiction claiming that appellees lack standing to assert their claims. In its Final Amended Judgment, the trial court denied the pleas to the jurisdiction as to appellees' rule challenge and declared the FRC Rule invalid because it "contravenes" Human Resources Code section 42.002(4) and "runs counter to the general objectives of the [ ] Human Resources Code." The Final Amended Judgment also ordered DFPS and HHSC to "refrain from issuing licenses under the FRC Rule until the Court of Appeals issues a decision on appeal or further Order of the Court" but to "continue to investigate and report any allegations of abuse or neglect, standards deficiencies, or violation(s) of rule of law at Karnes and Dilley during the pendency of any appeal."

## DISCUSSION

Appellants contend that, before we address the merits of appellees' rule challenge, we must determine whether any of the appellees has standing. Because standing is a component of subject-matter jurisdiction, we agree that we must first consider the issue. See *Texas Ass'n of Bus. v. Texas Air Control Bd.*, 852 S.W.2d 440, 445–46 (Tex. 1993) (noting that appellate courts consider plaintiff's standing under same standard by which they review subject-matter jurisdiction generally, which requires plaintiff to allege facts that affirmatively demonstrate court's jurisdiction to hear cause). Standing requires "a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court." *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 154 (Tex. 2012); see *Texas Dep't of State Health Servs. v. Balquinta*, 429 S.W.3d 726, 739 (Tex. App.—Austin 2014, pet. dism'd).

To satisfy the supreme court's standing test, a plaintiff "must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Heckman*, 369 S.W.3d at 154 (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)). The standing inquiry "begins with the plaintiff's alleged injury." *Id.* at 155. That is, the plaintiff must plead that she is *personally* injured, demonstrating facts that she, herself (rather than a third party or the public at large) suffered the injury. *Id.* As for the injury itself, it "must be concrete and particularized, actual or imminent, not hypothetical." *Id.* (quoting *DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304–05 (Tex. 2008)).

Standing is determined at the time suit is filed in the trial court, and subsequent events do not deprive the court of subject-matter jurisdiction. *Texas Ass'n of Bus.*, 852 S.W.2d at 446 n.9. We review the denial of a plea to the jurisdiction de novo. *Texas Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004).

We now consider whether each appellee has standing—that is, whether each has a concrete and particularized injury fairly traceable to the FRC Rule that is likely to be redressed by the requested relief.

### ***Whether Grassroots Leadership has standing***

\*4 Per the testimony of its Executive Director, Grassroots Leadership is a non-profit association focused on "advocating for policies that reduce reliance on incarceration and detention." Grassroots Leadership has alleged that it opposes the FRC Rule because it would allow Karnes and Dilley to detain children for longer periods of time under lower standards of care than are provided to children in all other Texas GROs and that the association has been forced to "divert resources to opposing the FRC Rule's adoption and the licensure of private prisons as childcare facilities."

An associational plaintiff can sue on behalf of its members, in which case it must demonstrate standing based on at least one freestanding claim by a member. *Texas Ass'n of Bus.*, 852 S.W.2d at 446–47. However, Grassroots Leadership has not asserted that it has any members and, therefore, cannot meet the requirements of the associational test for standing. *See id.* (adopting U.S. Supreme Court's associational-standing test requiring, relevantly, that association's members would otherwise have standing to sue in their own right and citing *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)); see also *Texas Soc'y of Prof'l Eng'rs v. Texas Bd. of Architectural Exam'rs*, No. 03-08-00288-CV, 2008 WL 4682446, at \*3–4 (Tex. App.—Austin Oct. 24, 2008, no pet.) (mem. op.) (declining to find standing where plaintiff association could not meet associational-standing test). Accordingly, Grassroots Leadership is required to establish standing based on "concrete and particularized" injury to itself, as an entity. *See Heckman*, 369 S.W.3d at 155; *City of San Antonio v. Headwaters Coal., Inc.*, 381 S.W.3d 543, 549–50 (Tex. App.—San Antonio 2012, pet. denied) (concluding that nonprofit corporation that owned land immediately upstream from city's proposed drainage project had standing to bring injunction suit because it showed

it would suffer particularized injury distinct from that suffered by general public).

Grassroots Leadership alleges that its injury here is that it was required to “divert volunteer and financial resources from its other work, including ... starting visitation programs to detained migrants at immigration detention centers around Texas, an advocacy campaign to end the immigration detention bed quota, and producing a research report on federal-court prosecution of migrants at the border.” In other words, Grassroots Leadership asserts that it spent money on its advocacy activities related to opposing the private detention facilities. However, these activities are not sufficient to meet the test for individualized standing, as the injury it claims to have suffered—the expenditure of advocacy resources—is too attenuated from any legally protected interest it could possibly have in the FRC Rule, not itself being subject to the rule or directly affected by its provisions. *See Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001) (“[b]y particularized, we mean that the injury must affect the plaintiff in a personal and individual way”) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 & n.1 (1992)); *M.D. Anderson Cancer Ctr. v. Novak*, 52 S.W.3d 704, 707–08 (Tex. 2001) (plaintiff must be “personally aggrieved” to establish standing). Furthermore, Grassroots Leadership’s choice to expend advocacy resources to challenge the FRC Rule and the detention centers generally—assuming that such “injury” were sufficiently concrete and particularized—cannot reasonably be considered “fairly traceable” to DFPS’s or HHSC’s conduct in promulgating or enforcing the rule.

\*5 While Grassroots Leadership cites *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982), for its contention that its advocacy expenditure creates standing, we note that the standing test outlined in *Havens* (requiring the plaintiff to have a “personal stake” in the outcome of the controversy, which was met by the organization’s allegation that it was required to spend money to counteract governmental policy) applies specifically to claims brought under the federal Fair Housing Act.<sup>4</sup> *See id.* at 378; *see also Midpeninsula Citizens for Fair Hous. v. Westwood Inv’rs*, 221 Cal. App. 3d 1377, 1385 (Cal. Ct. App. 1990) (declining to expand *Havens* beyond Fair Housing Act damages claims because it did not address constitutional standing). This is not a Fair Housing Act case, and we decline to expand *Havens* beyond such claims. Therefore, plaintiffs must meet the particularized injury test adopted by the Texas Supreme Court and the United States Supreme Court since *Havens*. *See Brown*, 53 S.W.3d at 305. Because Grassroots Leadership has not

pledged a particularized injury, we conclude that it lacks standing to bring this rule challenge.

#### ***Whether Valenzuela has standing***

Valenzuela operates a small day-care facility in El Paso and asserts standing based on “license disparagement,” contending that the licensing of the FRCs as GROs will affect parents’ perceptions of her day-care license, perhaps causing them to choose unlicensed child care based on their negative perceptions of the “jail-like” FRCs. *See Texas State Bd. of Podiatric Med. Exam’rs v. Texas Orthopaedic Ass’n*, No. 03-04-00253-CV, 2004 WL 2556917, at \*1 n.3 (Tex. App.—Austin Nov. 12, 2004, no pet.) (mem. op.) (holding that association of orthopedists met injury prong of standing test to challenge rule granting podiatrists right to perform procedures that otherwise would be considered practice of medicine based on association’s allegation that privilege of practicing medicine would be diminished because podiatrists are neither licensed nor trained to practice medicine); *see also Intercontinental Terminals Co. v. Vopak N. Am., Inc.*, 354 S.W.3d 887, 895 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (in case where standing was not at issue, court concluded that where one business competitor alleged loss of reputation and goodwill as injury in dispute with another competitor about use of shared rail line, complaining competitor sufficiently alleged threatened injury to support temporary injunction).

However, the case on which Valenzuela relies does not support standing under her circumstances, as it involved the expansion of an exception to medical licensure, which would put a previous license holder (orthopedists) in direct economic competition with new license holders (podiatrists). *See Texas State Bd. of Podiatric Med. Exam’rs*, 2004 WL 2556917, at \*2. Here, Valenzuela holds a State license to operate a small day-care facility; Dilley and Karnes, located in south Texas over 500 miles away, are twenty-four-hour GROs each with hundreds of residents and subject to a completely different type of licensing. Dilley and Karnes are not and could not be in any direct economic competition with Valenzuela’s facility. Valenzuela has not pleaded that she has ever been personally detained at any FRC or that she operates one. Her speculative scenario about parents choosing unlicensed day care due to potentially negative perceptions of day-care licenses such as hers is far too attenuated and speculative to support standing requirements. Simply put, Valenzuela has not pleaded any concrete and particularized injury to herself or her day-care facility as a result of the FRC

Rule. *See Brown*, 53 S.W.3d at 305. Accordingly, we conclude that Valenzuela lacks standing to bring this rule challenge.

#### ***Whether the detainees have standing***

\*6 The detainees, none of whom still reside in the detention centers,<sup>5</sup> assert standing based on alleged harm to their minor children, whom they claim will be detained for longer periods of time—which itself causes “grievous harm to children”<sup>6</sup>—and in “dangerous conditions” due to the challenged rule’s “bedroom-rule waivers” that allegedly “force children to sleep in the same bedroom as adult strangers, exposing them to invasion of privacy and risk of sexual assault.” Essentially, the detainees’ alleged injury is the harm that they contend will result from lengthier detention and the danger that the bedroom-rule waivers pose—they assert that these “risks to safety suffice to prove Detainee Plaintiffs’ standing.”<sup>7</sup> *See Texas Ass’n of Bus.*, 852 S.W.2d at 447 (holding that “[a] substantial risk of injury is sufficient” to confer standing). They further contend that the fact the FRC Rule and licensing thereunder will also incrementally benefit them and their children in the form of more rigorous background checks and inspections of facilities does not obviate their standing because the standing test does not require a balancing between alleged harm and benefit; it requires only a showing of harm, even simply “an identifiable trifle.” *See United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973) (noting that “injury in fact” element of standing test “serves to distinguish a person with a direct stake in the outcome of a litigation—even though small—from a person with a mere interest in the problem”); *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017) (holding that injury requirement of standing inquiry is “qualitative, not quantitative”).

While the detainees concede that the *fact* of detention is traceable to the federal government and to ICE (and thus not redressable in this lawsuit against appellants), they maintain that the *length and conditions* of detention—which the detainees explicitly challenge—are traceable to the State, which has the authority to issue the FRC licenses and waive the GRO minimum standards, as alleged here. As to the conditions of detention—the alleged danger from “forcing children to share bedrooms with adult strangers”—appellees contend in their brief that the FRC Rule’s waiver of bedroom minimum requirements “allows any adult—even a stranger—to sleep in the same bedroom with an unrelated child.” Appellees cite to testimony in the record from detainees who claim to have had to share a bedroom with their children

in addition to other, unrelated adults at Dilley and Karnes. They also cite to testimony of a twelve-year-old girl who was allegedly groped by an unrelated female adult detainee with whom she was sharing a bedroom.

However, a review of the text of the challenged rule belies appellees’ contention that the rule “allows children to share bedrooms with unrelated adults.” To the contrary, the FRC Rule explicitly forbids adults to share a bedroom with unrelated children: “A family residential center is not required to comply with all terms of the following Minimum Standards: ... the limitation on a child sharing a bedroom with an adult in § 748.3361 of this title (relating to May a child in care share a bedroom with an adult?), if the bedroom is being shared in order to allow a child to remain with the child’s parent or other family member.” 26 Tex. Admin. Code § 748.7(c)(2) (emphasis added). That is, the FRC Rule allows for a minor to share a bedroom with the child’s parent or adult family member; on its face, it does not allow a minor to share a bedroom with an *unrelated* adult. Simply put, the FRC Rule does not allow for the alleged harmful conditions about which appellees complain and, therefore, appellees have not asserted an injury that is fairly traceable to the FRC Rule’s bedroom-rule waiver that is sufficient to confer standing.

\*7 We further conclude that the length a child is detained—and the alleged harm resulting from longer detention periods allegedly made possible by licensure of the FRCs—is not fairly traceable to the FRC Rule and appellants. Rather, the length of detention is traceable to federal immigration policy and the *Flores* Settlement Agreement’s requirement that state facilities detaining minors be licensed. The FRC Rule and DFPS’s promulgation thereof are not what permits the allegedly longer detention periods about which appellees complain; rather, the length of detention is determined by ICE policy and is solely within ICE’s discretion. *See Southwest Pharmacy Sols., Inc. v. Texas Health & Human Servs. Comm’n*, 408 S.W.3d 549, 565 (Tex. App.—Austin 2013, pet. denied) (concluding that economic losses alleged by plaintiff resulted from legislative changes to Medicaid program, not from properly implemented rules effecting those changes). Length of detention is solely the province of ICE; implementation of the FRC Rule cannot determine how long detainees are detained.

Appellees’ alleged injury of lengthier detention caused by the FRC Rule is also too speculative to meet the concrete-injury requirement of the standing analysis.<sup>8</sup> *See DaimlerChrysler Corp.*, 252 S.W.3d at 307 (“[I]f injury is only hypothetical,

there is no real controversy.”). It is ICE that determines where detainees will be detained, not the FRC Rule or the State; were Dilley and Karnes not licensed, we cannot predict whether the detainees would be detained in a facility licensed by another state, whether they would be detained in unlicensed facilities, or whether they would be released. We conclude that the detainees’ alleged injury in the form of possible prolonged detention of their minor children is neither concrete and particularized nor fairly traceable to DFPS or HHSC and is, therefore, insufficient to confer standing.

Because none of the appellees has standing to challenge the FRC Rule, the trial court did not have subject-matter jurisdiction over the cause, and the trial court erred in denying appellants’ plea to the jurisdiction. Accordingly, we reverse the trial court’s judgment and render judgment granting appellants’ plea to the jurisdiction and dismissing appellees’ rule-challenge claims with prejudice.

#### All Citations

Not Reported in S.W. Rptr., 2018 WL 6187433

## CONCLUSION

### Footnotes

- 1 The Providers sued the Texas Department of Family and Protective Services (DFPS) and its Commissioner, Henry Whitman, because DFPS was at the time the agency that handled licensing of child-care facilities. Effective September 1, 2017, appellant Texas Health and Human Services Commission (HHSC) assumed responsibility for child-care licensing as a result of legislation directing that DFPS become a stand-alone agency that is separate from HHSC and will regulate child-care operations only to the extent of investigating child abuse, neglect, and exploitation. See Act of May 22, 2017, 85th Leg., R.S., ch. 316, §§ 22, 24, 38, 2017 Tex. Gen. Laws 601, 607, 612. In accordance with this transfer of responsibility, the relevant rules have been transferred to Title 26 of the Texas Administrative Code. See 43 Tex. Reg. 909 (2018) (announcing transfer of rules that contain minimum standards for child-care operations from DFPS to HHSC); see also, e.g., 26 Tex. Admin. Code § 748.7 (2018) (Health & Human Servs. Comm’n, How are these regulations applied to family residential centers?).
- 2 The facts in this section are derived from recitations in the trial court’s Amended Final Judgment.
- 3 Only the appellees’ rule challenge is before us on appeal, as the trial court dismissed appellees’ UDJA claim when granting appellants’ plea to the jurisdiction, and the trial court’s Amended Final Judgment, while not specifically ruling on the ultra vires claims, “dispose[d] of all parties and claims.” See *Lehmann v. Har-Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001) (noting that judgment issued without conventional trial is final if it actually disposes of all claims and parties). Appellees have not cross-appealed the trial court’s judgment with respect to their declaratory-judgment and ultra vires claims.
- 4 Grassroots Leadership also asserts that it has standing to redress the violation of its “statutory rights” under the Administrative Procedure Act (APA) in that DFPS allegedly did not “seriously consider” Grassroots Leadership’s objections and comments or give adequate justification for disregarding them when promulgating the final rule. See Tex. Gov’t Code §§ 2001.029, .030; *Planned Parenthood v. Gee*, 862 F.3d 445, 455 (5th Cir. 2017) (“[V]iolation of a statutory right, even standing alone, may be sufficient to satisfy the injury requirement ....”). We reject this argument because the supreme court has held that the APA does not extend the scope of constitutional standing. See *Finance Comm’n v. Norwood*, 418 S.W.3d 566, 582 n.83 (Tex. 2013) (“The [APA] does not purport to set a higher standard than that set by the general doctrine of standing, and it cannot be lower, since courts’ constitutional jurisdiction cannot be enlarged by statute.”). Moreover, the case on which Grassroots Leadership relies speaks to the alleged deprivation of a “statutory right of entitlement” as the basis of standing, see *Gee*, 862 F.3d at 455; here, Grassroots Leadership has no statutory right under the APA that rises to the level of an entitlement.
- 5 Appellants also assert that the detainees’ claims are moot based on the fact that none of them reside any longer in the facilities at issue. Because mootness is a question separate from standing, see, e.g., *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 162 (Tex. 2012), we address the issue of the detainees’ standing first and then, if necessary, appellants’ mootness argument.
- 6 There was evidence adduced at the temporary-injunction hearing from appellees’ expert about the psychological effect of detention on children, specifically about how the negative effects—including stress, trauma, and hypervigilance—increase the longer the children remain in detention.

- 7 The FRC Rule provides that FRCs must comply with the same “minimum standards” applicable to GROs generally, except that FRCs need not comply with the following minimum standards: (1) the maximum of four occupants per bedroom, (2) the prohibition against a child sharing a bedroom with an adult *if the bedroom is being shared in order to allow a child to remain with the child's parent or other family member*, and (3) the prohibition against children of opposite genders sharing a bedroom as long as the children are members of the same family and under the age of six. See 26 Tex. Admin. Code § 748.7(c).
- 8 Moreover, appellees conceded in their motion for summary judgment that the average length of stay at Karnes has actually decreased since the facility became licensed under the FRC Rule.

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